

# Development of Ukrainian Real Property and Mortgage Law: The American Perspective

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	592
II.	BACKGROUND.....	595
	A. <i>The Early Roots of Mortgage Law</i> .....	598
	B. <i>Property During Soviet Rule</i> .....	600
	1. <i>Advent of Soviet Legal System</i> .....	600
	2. <i>Regulation of Urban Housing</i> .....	603
	3. <i>Alienation of Property: Sale and Exchange</i> .....	607
	C. <i>Privatization</i> .....	609
	D. <i>The Emergence of a Mortgage Market</i> .....	611
III.	MODERN LAWS REGULATING PROPERTY AND MORTGAGE .....	613
	A. <i>Regulation of Land in Modern Ukraine</i> .....	614
	B. <i>Laws Regulating Mortgages</i> .....	619
	1. <i>Power to Mortgage Property</i> .....	620
	2. <i>Parties to the Mortgage Agreement</i> .....	621
	3. <i>Mortgageable Property</i> .....	622
	4. <i>Creation of a Mortgage Agreement</i> .....	624
	5. <i>Registration and Priority</i> .....	627
	6. <i>Enforcement</i> .....	630

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C.	<i>Realities of Ukrainian Housing Financing</i> .....	631
IV.	CONCLUSION .....	634

## I. INTRODUCTION

Modern Ukrainian commercial law started to develop following the break-up of the Soviet Union in August 1991 and the reemergence of Ukraine<sup>1</sup> as an independent democratic state.<sup>2</sup> As a result of the break-up, in 1991 the new state of Ukraine inherited the jurisprudence, institutions and government of the former Ukrainian Soviet Socialist Republic. While Ukraine quickly shed its Soviet past by changing the communist names of streets and institutions, the transition was not as easy when it came to substantive changes in Ukrainian jurisprudence and legal thinking.<sup>3</sup>

In order to establish an open market and promote democracy, Ukraine needed to develop its own system of law. Developments in property law, and particularly mortgage law, played an important role in the development of the market economy.<sup>4</sup> Ukraine's efforts in adapting its legal system to conform to the requirements of a new market economy

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1. Ukraine (Ukrainian pronunciation: Україна, *Ukrayina*, /ukra'jina/) is a country in Eastern Europe with a population of 48,523,000. It borders Russia to the northeast, Belarus to the north, Poland, Slovakia and Hungary to the west, Romania and Moldova to the southwest, and the Black Sea and Sea of Azov to the south. The historic city of Kiev (*Kyiv*) is the country's capital. Ukraine is one of the largest countries in Europe, comparable to France in territory and population. Ukraine occupies a central position in Europe's geopolitical landscape. It has the continent's second-largest conventional army. See, e.g., United Nations Cyberschoolbus, Country at a Glance—Overview, <http://cyberschoolbus.un.org/infonation/index.asp?id=804> (last visited Feb. 13, 2009); Adrian Karatnycky, *Ukraine at Crossroads*, J. DEMOCRACY, Jan. 1995, at 117, 117.

2. On August 24, 1991, Ukrainian legislature (Verkhovna Rada) declared independence from the Soviet Union, "following the aborted coup attempt in Moscow against Mikhail Gorbachev by communist hard-liners." Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191, 191 n.1 (2000). "In view of the mortal danger surrounding Ukraine in connection with the state coup in the USSR on August 19, 1991 . . . the Verkhovna Rada declares independence of Ukraine and creation of the independent Ukrainian state—Ukraine." Declaration of Independence of Ukraine, Vidomosti Verkhovnoyi Rady [VVR] 1991, No. 38, p.502, available at [http://gska2.rada.gov.ua/site/postanova\\_eng/Rres\\_Declaration\\_Independence\\_rev12.htm](http://gska2.rada.gov.ua/site/postanova_eng/Rres_Declaration_Independence_rev12.htm). The Declaration of Independence established Ukraine as an independent, democratic state. *Id.* Independence was subsequently confirmed in a national referendum held on December 1, 1991, in which 90.3% of population participating in the referendum voted for an independent Ukraine. By 1992 Ukrainian independence was recognized by sixty-four states. Ministry of Foreign Affairs of Ukraine, *The Way to Freedom and Independence*, <http://www.mfa.gov.ua/mfa/en/publication/content/366.htm> (last visited Feb. 13, 2009).

3. See Lehmann, *supra* note 2, at 191.

4. See Anatoly Bondar & Boo Lilje, *Land Privatization in Ukraine* 5 (Apr. 19–26, 2002), [http://www.fig.net/pub/fig\\_2002/Ts7-6/TS7\\_6\\_bondar\\_lilje.pdf](http://www.fig.net/pub/fig_2002/Ts7-6/TS7_6_bondar_lilje.pdf).

are undeniably substantial.<sup>5</sup> However, the task of creating a system of law that deals with security transactions is an arduous one. After collapse of the Soviet Union, to make things more complicated, Ukraine was starting from a clean slate. Unlike the American law of mortgages that derived from fourteenth and fifteenth century English common law, and thus has had the luxury of more than six hundred years of development,<sup>6</sup> Ukraine had no foundation for developing its real estate jurisprudence. During the Soviet rule, there was no need for mortgage laws because real property belonged to the State and could not be sold or rented by private persons.

Despite this lack of prior experience, Ukraine is currently developing its mortgage jurisprudence and the market is ready for it. The real estate market is growing with incredible speed, especially in the capital of Ukraine, Kiev.<sup>7</sup> In the last few years, land has been one of the most cost effective and reliable investments in Ukraine.<sup>8</sup> However, the system is

5. See Evelyne Bernasconi & Stefanie Solotych, *Law Transfer in Eastern Europe—Systems in Transition from the Viewpoint of Practitioners*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 487, 488–90 (2003) (discussing hardships of implementing new legislation in Eastern Europe in daily legal practice. Even though the laws have undergone a big change and have been shaped to conform to a market economy, the required changes in legal thinking have not yet occurred. Public understanding of the government's role as a dominant influence, like it was during the Soviet rule, hinders the process of legal transfer and development of new concepts of the role of the state and law. The lack of skills to deal with relationships of private law and constant refusal to apply the concept of freedom of contract are the realities of the transfer of laws and new legal orders in Eastern Europe).

6. See GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 1.2 (3d ed. 1994).

7. The year 2006 saw huge growth in real estate prices across many of Ukraine's big cities. The largest surge was in Odessa, where apartment prices all but tripled. Also, Kiev reportedly experienced the greatest rise in prices of any world capital. . . .

. . . .

Kiev leads the country in terms of real estate prices, which have been increasing by 50% each year since 2004. These days the cheapest single-room apartments cost nearly \$70,000 (and you can imagine their condition).

TryUkraine.com, *Trends in Ukraine's Real Estate Market* (Jan. 2007), [http://www.tryukraine.com/work/real\\_estate/07\\_01.shtml](http://www.tryukraine.com/work/real_estate/07_01.shtml).

8. "These days in Kiev it sometimes seems like everyone has bought apartments or land for investment purposes. People have gotten used to viewing real estate as a reliable investment—certainly better than banks . . . ." *Id.*

still immature and needs a lot of improvement.<sup>9</sup> Financing of housing, land, commercial land, and buildings is rare. Inconsistencies and ambiguities in laws and lack of experience with their implementation hinder development of secured transactions. To create a healthy investment environment, Ukraine needs to better regulate its land market by establishing comprehensive and stable rules.

Although Ukraine is a civil law country,<sup>10</sup> the United States has influenced<sup>11</sup> many of Ukraine's new legal and economic developments. The purpose of this Comment is to present an in-depth discussion and evaluation of the history and modern state of property and mortgage laws in Ukraine. This Comment will use American mortgage laws to provide some answers to the existing uncertainties in the Ukrainian jurisprudence. While no claim is made that American mortgage laws and principles are superior to those of any other country, the American model has been developed and implemented over the course of more than two hundred years, and it may provide some answers for the evolving Ukrainian legal system.

Part II of this Article starts by examining the background of the mortgage concept. It then proceeds to discuss the history of property and mortgage laws in Soviet Ukraine. It next discusses the modern state of property and mortgage affairs in Ukraine. Part III focuses on the law of Ukraine On Mortgage, the current Ukraine mortgage statute, and provides a detailed discussion of its shortcomings.

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9. Housing finance in Ukraine remains underdeveloped despite robust lending volumes and increasing homeownership activity over the last years. The major obstacles for the successful development of Ukrainian mortgage market operations include an underdeveloped legislative framework for mortgage lending, limited long-term sources of funding and lack of mortgage industry standards, including legal documentation for mortgage transactions.

International Finance Corporation, Advisory Projects in Ukraine, [http://www.ifc.org/ifcext/eca.nsf/Content/ukraine\\_advisoryprojects](http://www.ifc.org/ifcext/eca.nsf/Content/ukraine_advisoryprojects) (follow "Ukraine Mortgage Project" hyperlink; then follow "More" hyperlink) (last visited Feb. 13, 2009).

10. The Soviet legal system, and accordingly the Ukrainian legal system as well, are outgrowths of the civil law tradition because the Russian Empire had historically been a civil law society. See Lehmann, *supra* note 2, at 195.

11. "Ukraine plays a key role in U.S. foreign policy objectives due to its strategic position between Europe and Eurasia and its importance for regional stability." USAID, Europe and Eurasia: Ukraine, [http://www.usaid.gov/locations/europe\\_eurasia/countries/ua/](http://www.usaid.gov/locations/europe_eurasia/countries/ua/) (last visited Feb. 13, 2009). For example, the United States implements its policies in Ukraine through the U.S. Agency for International Development (USAID), which is an independent agency that provides development and humanitarian assistance around the world. See USAID, About USAID, [http://www.usaid.gov/about\\_usaid/](http://www.usaid.gov/about_usaid/) (last visited Feb. 13, 2009). With a budget of \$1.6 billion in Ukraine USAID implements its programs to create a stable and secure financial sector, accelerate growth of small and medium enterprises, promote legal and regulatory reforms, and improve the business skills of Ukrainian entrepreneurs and others. See USAID, Ukraine: Country Profile, [http://www.usaid.gov/locations/europe\\_eurasia/countries/ua/ukraine.pdf](http://www.usaid.gov/locations/europe_eurasia/countries/ua/ukraine.pdf) (last visited Feb. 13, 2009).

## II. BACKGROUND

To understand the differences and similarities between American and Ukrainian modern mortgage laws, it is necessary to consider their historical development of property and mortgage laws. Ukrainian and American property laws stem from two different legal systems. The Ukrainian laws stem from the system of civil, or Roman law, whereas the American laws find their origins in the common law system.<sup>12</sup> The Kievan Russia, the state which existed on the territory that is now modern Ukraine from about 880 B.C. to the twelfth century, became part of Roman civil law tradition by the way of Byzantines.<sup>13</sup> On the other hand, the United States adopted the English common law system after the War of Independence by passing statutes which acknowledged that the English common law system was brought and established by the first settlers.<sup>14</sup> The main difference between the two systems lies in the sources of law upon which they rely. The common law system is grounded in the doctrine of *stare decisis*,<sup>15</sup> while the civil law system is based upon on the enactment of comprehensive legislative acts and

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12. Before the collapse of the Soviet Union legal scholars defined three major legal families: the Romano-Germanic family (civil law system), the Common law family (based on the English law), and the family of Socialist law. Before the Revolution, Socialist block countries were part of the Romano-Germanic family and thus they carried some traits of Romano-Germanic law. See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 21–26 (2d ed. 1978). For a discussion on how Soviet regime changed the laws of Romano-Germanic family in countries of Soviet block see *id.* at 25. As hard as Soviet legal scholars were trying to classify their legal system as a new type of law, today's former socialist states are trying just as hard to declassify themselves into the traditional Roman law system.

13. See Francis Dvornik, *Byzantine Political Ideas in Kievan Russia*, 9 DUMBARTON OAKS PAPERS 73, 76 (1956) (discussing how the Russians were influenced by Byzantine legislation because "unlike the Germanic nations who escaped the direct influence of Roman law, most of the Slavic nations were tutored in early Christian history by Byzantium where Roman law, codified by Theodosius II and Justinian I, was the mainspring of public life"); F. Dvornik, *The Kiev State and Its Relations with Western Europe*, 29 TRANSACTIONS ROYAL HIST. SOC'Y 27, 35 (1947).

14. The United States and the Commonwealth countries are members of the common law tradition by the reason that "whenever British colonists occupied and settled a new colony which lacked a 'civilized' legal system . . . they were deemed to have taken with them the English law then in being." See David V. Williams, *Constitutional Law—Reception and Impact*, in THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW 1, 2 (Jerome B. Elkind ed., 1978).

15. "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

codification.<sup>16</sup> Notwithstanding the differences in the origin of Ukrainian and American legal systems, the ultimate concepts of real property and mortgage are very similar.

The Roman law developed a concept of absolute ownership of property as early as 200 B.C., during its classical times.<sup>17</sup> Italian lands were called *res Mancipi* and could be transferred only through the *mancipatio* ceremony.<sup>18</sup> The ceremony demanded the presence of five witnesses and a person holding bronze scales:

The transferee grasped with his hand the thing to be mancipated (unless it were land which could be mancipated at a distance), held a piece of bronze in his other hand . . . [t]hen he struck the scales with the bronze and gave it to the transferor as a symbolic price.<sup>19</sup>

One of the most important characteristics of ownership in Roman law was its exclusivity.<sup>20</sup> Even though legal rights over property were vested in the whole family, and not in individuals, only one group of persons could be the owner of an item of property.<sup>21</sup> However, in early Roman law, there were still restraints on alienation of the property,<sup>22</sup> and most people acquired property through inheritance or marriage.<sup>23</sup>

Anglo-American property law traces its origins to the Norman Conquest of England during the eleventh century, as a result of which the feudal system of landholding was established.<sup>24</sup> After the Conquest, William the Conqueror made an ownership claim to all of the lands that

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16. See, e.g., MARY ANN GLENDON, MICHAEL W. GORDON & PAOLO G. CAROZZA, *COMPARATIVE LEGAL TRADITIONS* 125 (2d ed. 1999) (pointing out that in a civil law system "enacted law is the pre-eminent source of law, and court decisions are not binding in subsequent cases, either on the courts that issue them or on lower courts in the same hierarchy"); FREDERIC G. KEMPIN JR., *HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW* 14–15 (3d ed. 1990).

17. See H.F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 142 (1932). "Ownership, in the developed law, may be defined as the unrestricted right of control over a physical thing, and whosoever has this right can claim the thing he owns wherever it is and no matter who possesses it." *Id.*

18. ALAN WATSON, *ROMAN PRIVATE LAW AROUND 200 BC* 60–61 (1971).

19. *Id.* at 61.

20. See THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 225 (1999).

21. *Id.* at 225–26.

22. Max Rheinstein, *Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems*, 3 U. CHI. L. REV. 624, 625 (1936).

23. Jim Powell, *The Roman Legacy of Property Rights*, WEBZINE, Dec. 20, 2005, <http://www.thewebzine.com/articles/122005Romans.html>.

24. Feudalism is . . . a theory and practice of social and political relations based upon the principles of the *feudum*, and the *feudum* is a legal concept by which land—with other matters—is susceptible not of outright and exclusive ownership but of a *dominium* or partial and conditional right, which may be, and normally is, complementary to the rights of others, such as the subordinate right of a vassal or the superior right of an overlord.  
J.E.A. Jolliffe, *Alod and Fee*, 5 CAMBRIDGE HIST. J. 225, 225 (1937).

belonged to Saxon nobles and later divided these lands between English barons, tenants in chief.<sup>25</sup> The land belonged to these barons so long as they rendered their services to the king.<sup>26</sup> Furthermore, tenants in chief were allowed to sublet their tenancy in return for services from subtenants.<sup>27</sup> This hierarchical relationship involving the lord and tenant introduced an element of non-exclusivity into the law which was previously unknown to the Roman law. Feudal structure allowed lords and tenants to maintain ownership of a sort to the same piece of land, whereas the Roman system allowed only exclusive ownership.<sup>28</sup> The common law right of inheritance developed only by the end of the twelfth century, followed by development of the right of alienation at the end of thirteenth century.<sup>29</sup>

The reforms of the nineteenth century almost entirely removed restraints on alienation of property in both civil and common law.<sup>30</sup> However, another form of restraint on alienation developed under the common law and came to be known as the "future interest."<sup>31</sup> The civil law has developed some form of a restraint as well. It provided that a person could specify the future not of any specific piece of property, but of the entire estate.<sup>32</sup> This differed from the common law system where such an act could only be done through a testamentary instrument.<sup>33</sup>

25. See, e.g., WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 14–15 (3d ed. 2000).

26. See, e.g., *id.* at 15 (describing different types of services that tenants in chief could render to the king). Most of the tenants provided military service and some of them provided royal household and religious duties.

27. *Id.*

28. See WATKIN, *supra* note 20, at 226.

29. See STOEBUCK & WHITMAN, *supra* note 25, at 17–18.

The Statute *Quia Emptores* was enacted in 1290 to settle conclusively all questions relating to alienation of fees granted to a person "and his heirs." *Quia Emptores* established (1) that such fees—then coming to be called fee simple—were freely transferable *inter vivos* provided the transferee was substituted for the transferor and no new tenure was created . . .

*Id.* at 18 (footnotes omitted).

30. Rheinstein, *supra* note 22.

31. "[A future interest] is created by a legal transaction of an individual who wishes to fix the legal fate of a certain piece of property for a more or less distant future." *Id.* at 625–26.

32. *Id.* at 626.

33. *Id.* The civil law rule holding that the future interest could be created only with respect to the estate as a whole is a result of the civil law distinction between the law of property and the law of succession. The law of property regulates single objects and their transfer *inter vivos*, while the law of succession regulates succession upon death, which is regarded as succession to a person's entire estate. *Id.* at 628–29.

### A. The Early Roots of Mortgage Law

Eventually both the Roman law and the early English law developed the concept of mortgage as we know it today. The mortgage idea was known at those early times and is generally known today as a “conveyance or retention of an interest in real property as security for performance of an obligation.”<sup>34</sup>

The exact roots of the mortgage concept are unknown.<sup>35</sup> Some writers believe that the notion of mortgaging lands has passed from Jews to Greeks and Romans, and was then introduced in the Common Law of England.<sup>36</sup> The earliest form of security known in Rome was a sale for resale transaction known as *fiducia cum creditore*.<sup>37</sup> The debtor transferred ownership of the land to the creditor, who then transferred it back after the debtor paid the debt in whole.<sup>38</sup> At this point, the creditor received full ownership rights to the land and the debtor was forced to depend on the creditor’s integrity.<sup>39</sup> Dishonest creditors could simply sell the security before the debt was paid or in default.<sup>40</sup> Due to its draconian rules, *fiducia cum creditore* was replaced by later forms of security—*pignus* and *hypotheca*.<sup>41</sup> The *pignus* form of security was more liberal

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34. See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 1.1 (1997).

35. It is contended by some common law writers that the present notion of a mortgage and its redemption was strictly founded on the common law doctrine of conditions. The general features of the present and civil law of mortgages are so similar that we cannot resist the conclusion, that one was borrowed from the other, however hardy the arguments put forth by national egotism or professional prejudice.

*The Mortgage; Its Origin and History—Principles Presiding over Its Application to Real and Personal Property—Remedies*, 4 AM. L. REG. 449, 450 (1856) [hereinafter *The Mortgage*].

36. The first record of a mortgage is to be found in the sacred writings. Mortgages of a peculiar nature are said to have been used by the Jews, from whom, according to some writers, the notion of mortgaging lands had origin. From the Jews the idea of a mortgage is supposed to have passed to the Greeks and Romans, and from them engrafted upon the Common Law of England.

*Id.* at 450.

37. See Donald E. Phillipson, *Development of the Roman Law of Debt Security*, 20 STAN. L. REV. 1230, 1234 (1968) (explaining that only “freemen” could have ownership of the land). Freemen could also be divided in two categories: those who could have civil ownership of land and others who could only have bonitary ownership. Civil ownership was the highest property right and was available only to Roman citizens or other free men who were granted commercial power. Bonitary ownership could be created by a transfer of control with intent to transfer ownership. See *id.* at 1230–31.

38. Phillipson, *supra* note 37, at 1230–31.

39. *Id.* at 1234–35.

40. *Id.* at 1236.

41. *Id.* at 1236–37. But see John H. Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas. III*, 11 HARV. L. REV. 18, 32 (1897) (arguing both that the *fiducia*-form did not cease to exist after the pledge and *hypotheca* forms of security emerged, and that the term *fiducia* is not found in Justinian’s compilations because



and flexible than *fiducia* since it did not require a conveyance of ownership from debtor to creditor.<sup>42</sup> Still, the possession of the security in the *pignus* form of mortgage passed to the creditor on the condition that it would be returned to the owner when the debt was paid.<sup>43</sup> Eventually, the *hypotheca* principle was developed. When the *hypotheca* was used, the thing pledged<sup>44</sup> remained in the debtor's possession.<sup>45</sup> The *hypotheca* form of pledge most closely resembles our understanding of mortgage today.

The substance of American mortgage law was largely influenced by English common law, which developed in the fourteenth and fifteenth centuries.<sup>46</sup> However, the Saxon law closely resembled the civil law system of pledge, even with respect to registration of a pledge in the county court.<sup>47</sup> In the beginning, pledge was a conveyance of a fee simple ownership expressed on the condition subsequent.<sup>48</sup> If the debt was repaid on time, the mortgagee's (creditor's) estate terminated, but if the debt was not paid, the mortgagee retained ownership of the land even if the mortgagor (debtor) paid just one day late.<sup>49</sup>

Just as in Roman law, the mortgagee was given possession of the mortgaged land in order to receive a benefit from the loan, as charging interest on the loan was prohibited.<sup>50</sup> In time, customs allowed the debtor to retain the possession of the land while the creditor retained the

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Tribonian and his Greek assistants substituted their own word *hypotheca* for the classical term *fiducia* wherever it occurred in the passages they assembled).

42. See Phillipson, *supra* note 37, at 1237.

43. *Id.* at 1238.

44. "Pledge" had different meanings during different periods of time. During *fiducia* times a pledge was a type of security created when a debtor transferred his property to the creditor with the possibility of receiving it back when the debt was paid. See JOLOWICZ, *supra* note 17, at 295. But after the notion of *hypotheca* developed, the pledging of a thing meant securitization of a debt by "mere agreement, without the transfer of either ownership or possession." See *id.* at 314.

45. See Phillipson, *supra* note 37, at 1245.

46. See NELSON & WHITMAN, *supra* note 6.

47. See H.W. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 5-6 (1890) (arguing that the "provision for registration was a mere adaptation to English ground of the Roman system").

48. See ROGER BERNHARDT & ANN M. BURKHART, REAL PROPERTY IN A NUTSHELL 344-45 (5th ed. 2005).

49. See *id.* at 345.

50. The debtor's right to collect profits on pledged property was "especially important because at this stage of English legal history, the collection of any interest on indebtedness was deemed usurious." RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1 cmt. a (1996).

right to obtain the possession.<sup>51</sup> To mitigate the cruel rules of common law, the English Chancery court intervened to help debtors who defaulted on payment and allowed them to regain ownership to the property upon full payment within reasonable time.<sup>52</sup> The Chancery Court eventually established the right of redemption by declaring that the land was a security which the mortgagee held as a trust. Therefore, after default, the mortgagor could restore his legal rights to the land.<sup>53</sup>

## *B. Property During Soviet Rule*

### *1. Advent of Soviet Legal System*

In 1917, the Great October Socialist Revolution abolished the Tsarist regime in the Russian Empire and the Bolshevik regime came to power.<sup>54</sup> The new regime repealed jurisprudence and former legal infrastructure, as well as the courts, procuracy, and the police.<sup>55</sup> The implementation of the Soviet legal system was a major set-back in the development of Ukrainian commercial law. While the United States mortgage system was developing and perfecting itself, the mortgage principles in the Soviet Ukraine were completely abolished. In contrast to the Soviet treatment of housing as a "social good," the United States housing was considered a "commodity," tax shelter, and investment.<sup>56</sup> Development of United States housing was stimulated through natural growth of the real estate market as opposed to the government-controlled Soviet market.<sup>57</sup> Such free real estate market development in the United States benefited the economy in general. The biggest difference between the real estate situations in the United States and Soviet countries was that in the United States housing was rationed by price. In contrast, in the Union of Soviet Socialist Republics (USSR), bureaucrats handled the distribution of housing and decided "when, where, and how well one would be housed."<sup>58</sup>

Starting in 1917, Russia (including Ukraine as a part of Russia) began to build a new communistic society. Socialists proclaimed that they would overturn the static Roman law society into a new social order in

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51. NELSON & WHITMAN, *supra* note 6.

52. *See id.* § 1.3.

53. *See The Mortgage, supra* note 35, at 451.

54. V.N. Kudriavtsev, *Soviet Legal System: Trends of Development*, in *COMPARATIVE LAW AND LEGAL SYSTEM: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES* 3, 4 (W.E. Butler & V.N. Kudriavtsev eds., 1985).

55. *Id.*

56. Henry W. Morton, *Housing in the Soviet Union*, *PROC. ACAD. POL. SCI.*, Vol. 35 No. 3, at 69, 69 (1984).

57. *Id.* at 69.

58. *Id.* at 79.

which the very concepts of state and law would vanish.<sup>59</sup> As a result, all means of production were expropriated by the government and private legal relationships between citizens were extremely limited—everything became public law.<sup>60</sup> The establishment of Soviet laws rendered a complete change in private relationships. Lenin's proposition that there was "nothing private" in the economic field and that "everything [was] public law by nature" made private law non-existent.<sup>61</sup> Once the Communists came to power, the Marxism-Leninism doctrine became the Soviet religion, policy, and a way of life; everybody and everything was examined and evaluated, and exterminated if it was not following the teachings of the party.<sup>62</sup>

Central to the country's transformation to communism was the abolition of private property. For Soviet communists, the concept of private property was the main difference between the capitalist and the Soviet countries.<sup>63</sup> The essence of capitalism was private property, while the essence of socialism was the abolition of such.<sup>64</sup> Lenin's

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59. See DAVID & BRIERLEY, *supra* note 12, at 25. At that point, legal scholars recognized a third type of legal family: Socialist laws. The legal rule was still based on Roman law, but the true source of Socialist law lied with legislators who expressed the will of the Communist Party. *Id.*

60. DAVID & BRIERLEY, *supra* note 12, at 25.

61. See Bernasconi & Solotych, *supra* note 5, at 488 (alteration in original).

62. See DAVID & BRIERLEY, *supra* note 12, at 155–62 (explaining that Marxism-Leninism doctrine in the Socialist countries represented different philosophical doctrine than in the Western countries).

The Marxist doctrine was founded by Karl Marx and Friedrich Engels. *Id.* at 156. The substance of the Marxist doctrine was the idea that private ownership of the means of production is the origin of social inequality and class struggle. Thus such ownership had to be abolished. "[T]he root of all social evil is class antagonism; social classes can, and must, be suppressed by prohibiting the private appropriation of productive forces and by putting them at the disposal of the collectivity which will exploit them in the common interest. . . . [T]he new society . . . will have neither state nor law . . . . Man will once again be free." *Id.* at 160–61. When the Marxist party—also known as the Bolshevik party—succeeded in gaining power in Russia, Lenin, the leader of the party, played such an important role that the theory became known as Marxism-Leninism. *Id.* at 162. This was the government's official doctrine and any other thinking was wrong, representing a subversive threat to the social order that had to be exterminated. Those who did not follow the Marxism-Leninism doctrine were enemies of the state and had to be eliminated. All citizens were obliged to know the principles of the doctrine and follow it. *Id.* at 156.

63. See Randy Bregman & Dorothy C. Lawrence, *New Developments in Soviet Property Law*, 28 COLUM. J. TRANSNAT'L L. 189, 189 (1990), reprinted in LEGAL REFORM IN THE USSR 189, 189 (Columbia Journal of Transnational Law Ass'n eds., 1991).

64. *Id.*

pronouncement that the “the land belongs to those who will till it” and that the land will be taken from the wealthy and given to peasants, helped him in his struggle for power.<sup>65</sup> However, after gaining power, the Bolsheviks did not keep their promises.<sup>66</sup> In fact, in January of 1918, Bolsheviks adopted the Decree of All Russian Central Executive Committee which provided that land ownership no longer existed.<sup>67</sup> What followed was the abolition of private ownership of houses and the nationalization of private industrial enterprises.<sup>68</sup> The next biggest move that wiped out all traces of private property in Russia was the abolition of inheritance.<sup>69</sup> The system of inheritance by operation of law or by will was invalidated and the property of the deceased became the property of the Soviet Government.<sup>70</sup> The former court system and civil procedure were abolished as well.<sup>71</sup> The new courts were formed where judges made their decisions based on “revolutionary conscience” and “the socialist feeling of justice.”<sup>72</sup> The goal of the new regime was to create a country where money would become unnecessary and sharing would replace commercial relations.<sup>73</sup> Therefore, all types of private property—with the exception of some personal property—were transformed into “socialist property.”<sup>74</sup>

Another big strike to private property was collectivization which began in 1929.<sup>75</sup> The private farms were mercilessly confiscated from wealthy farmers (*kulaks*) and given to the agricultural cooperatives known as *kolkhozy*.<sup>76</sup> Peasants were also forced into *kolkhozy* and had to transfer whatever land and livestock they owned in exchange for the right of membership.<sup>77</sup> By 1937, 18,500,000 family farms were substituted by *kolkhozy* which had represented 93% of the cultivated

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65. See Samuel Kucherov, *Property in the Soviet Union*, 11 AM. J. COMP. L. 376, 376 (1962).

66. See *id.*

67. See *id.*

68. *Id.* at 376–77.

69. *Id.*

70. *Id.*

71. See DAVID & BRIERLEY, *supra* note 12, at 169.

72. *Id.*

73. *Id.*

74. See Bregman & Lawrence, *supra* note 63.

75. Under the policy of *collectivization*, which was pursued most intensively by Joseph Stalin in 1929–1933, peasants were forced to give up their individual farms and join large collective farms. They objected violently, and in many cases slaughtered their livestock and destroyed their equipment before joining. By 1936 almost all peasantry had been collectivized, though millions had also been deported to prison camps. *Collectivization*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/125592/collectivization> (last visited Feb. 13, 2009).

76. *Id.*

77. *Id.*

land.<sup>78</sup> At the time of the revolution, most of the Soviet population lived in rural single family housing. Beginning 1929, however, the abolition of private property and collectivization forced millions of rural residents to move into industrial cities.<sup>79</sup>

## 2. Regulation of Urban Housing

Establishment of the Communist dictatorship and abolition of private property resulted in a substantial housing shortage.<sup>80</sup> The housing fund,<sup>81</sup> which now belonged to the State, made Ukrainians entirely dependent on the state agencies that had the authority to decide who would receive living quarters and who would not.<sup>82</sup> The housing system was based on the belief that it only had to satisfy basic human needs and completely lacked the element of investment in property. Urban housing questions were not left to the citizens. Instead, the government created a complex structure of vertical and horizontal administrative relationships.<sup>83</sup> At the top of hierarchy was ownership by the State, beneath it was

78. DAVID & BRIERLEY, *supra* note 12, at 172.

79. Morton, *supra* note 56, at 71 (providing statistical information on the increase of urban population from 26.3 million in 1926 to 56.1 million by 1939 and 168.9 million by 1981).

80. Timothy Sosnovy, *The Soviet Housing Situation Today*, 11 SOVIET STUD. 1, 1-2 (1959). "[T]he housing conditions of urban residents depend almost entirely on the volume of housing erected by the state," which was completely inadequate. *Id.* at 2.

81. The basic source of the local soviet's rights to the housing fund under its control is to be found in the expropriation of privately owned property carried out in the early days of the revolution. Since then the fund has been greatly increased by building and by the transfer of accommodation from State undertakings . . . .

Bernard Rudden, *Soviet Housing Law*, 12 INT'L & COMP. L.Q. 591, 594 (1963).

82. See Sosnovy, *supra* note 80, at 2.

The political and economic system in the USSR makes the Soviet citizen completely dependent on the state through its multifarious agencies. Food, clothing, education, employment, housing—these the Soviet citizen can obtain only from the state or with the assistance of the state. The bulk of the housing fund in the cities and worker settlements is the property of the state, and the state has monopoly control over the housing belonging to it. Direct operation of residential facilities is entrusted to the local soviets and to state institutions and industrial enterprises. They have the right to grant a worker housing space or to withhold it from him.

*Id.*

83. See Rudden, *supra* note 81, at 592 (comparing Soviet fragmentation of ownership to the hierarchy of estates in common law systems. The hierarchy is marked by external dependency and internal freedom as a ranked progression of interests is regulated from above).

administration by the local soviets and State enterprises, and at the bottom was the individual user.<sup>84</sup>

All of the privately owned property expropriated during the early days of the revolution became part of a housing fund controlled by the local government councils.<sup>85</sup> Centralized regulation of housing was cumbersome and was therefore delegated to the local authorities, such as the city housing administration.<sup>86</sup> The city housing administration organized house managements to handle a specific living accommodation, such as a large apartment building with 500 or more inhabitants.<sup>87</sup> The house manager was the “lessor” for individual tenants according to their “rental agreements.”<sup>88</sup> In essence, individual tenants would rent housing from the Soviet government and pay specific amounts of rent each month, even where the apartment had been privately owned by the individual before the revolution.

All living dwellings in the cities were of two types: apartment-type dwellings with separate apartment units, or communal dwellings, where groups of people lived in the same apartment and shared kitchens and bathrooms.<sup>89</sup> Obtaining any living space from the authorities was an important event and a huge celebration for any Soviet citizen. Families grew in size but continued to live in the same apartments for generations.<sup>90</sup> A separate apartment, no matter how small, was highly coveted. Yet, because of housing scarcity, many families shared their living quarters.<sup>91</sup> Housing conditions in the cities worsened, and many of the new workers coming into the cities had to live in barracks, shacks, or communal apartments.<sup>92</sup> In communal dwellings, separate rooms were part of rental agreements, while areas such as kitchens, corridors,

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84. *Id.*

85. *Id.* at 594.

86. *Id.* at 598.

87. *Id.*

88. *Id.* at 599.

89. Sosnovy, *supra* note 80, at 6. Apartments occupied by one family usually consisted of one or two rooms. In houses for privileged groups, every apartment, regardless of its size, was intended for occupancy by a single family. *Id.* at 7.

90. See Morton, *supra* note 56, at 75.

91. See Rudden, *supra* note 81, at 599. The sensitivity of the housing situation influenced all aspects of Russian life and writings about it, and it is clearly exemplified in Boris Pasternak’s famous novel, *Doctor Zhivago*, where upon return home from World War I, Dr. Zhivago finds that he has to share his family’s Moscow mansion with workers and their families. Robert M. Buckley & Eugene N. Gurenko, *Housing and Income Distribution in Russia: Zhivago’s Legacy*, 12 WORLD BANK RES. OBSERVER 19, 19 (1997).

92. See Morton, *supra* note 56, at 75. Even newlyweds were unable to escape the problem, and “[had] little chance of moving into their own apartments and [were] destined to live with in-laws, perhaps for decades.” *Id.*

and bathrooms were communal property.<sup>93</sup> By 1958, the average amount of living space per person declined to 4.97 square meters while the health norm was 9 square meters.<sup>94</sup> Room occupancy reached three persons per room.<sup>95</sup> If a person occupied more living space than the norm allowed and it was a separate room, the room could be confiscated.<sup>96</sup> If such a surplus was discovered, the housing administration would issue a notice to the tenant, ordering the tenant to invite somebody else to live in the extra space. If the tenant refused to invite a neighbor, the local management would select such a neighbor.<sup>97</sup>

The main legal document regulating housing affairs was the Order of the Central Executive Committee and Soviet of People's Commissars of the U.S.S.R. "On the Reservation of the Housing Fund and the Improvement of Housing in Cities" dated October 17, 1937 (1937 Order).<sup>98</sup> According to the 1937 Order, two documents were required for the individuals to move into a dwelling: an occupation order and a rental agreement.<sup>99</sup> The local executive committee decided who was entitled to the accommodation, and the housing administration issued an occupation order.<sup>100</sup> The order alone, while necessary, was not sufficient to create a legal right to accommodation.<sup>101</sup> In addition, the lessee had to have a written rental agreement defining the rights of the parties.<sup>102</sup> The parties to the rental agreement were the lessor, the house manager, and the lessee, the individual named in the occupation order.<sup>103</sup>

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93. By the year 1926, more than half of the urban families lived in a single room, and one-tenth lived in part of a room. On average, 36.5% of urban families shared their kitchens and bathrooms with other families. Sosnovy, *supra* note 80, at 3–4.

94. The USSR was the only country in the world where housing was measured in square meters of living space per person instead of number of occupants per room. This was connected to the immense shortage in housing. *See id.* at 3–5.

95. *Id.* at 5.

96. Rudden, *supra* note 81, at 600.

97. *Id.* at 605.

98. *Id.* at 596.

99. *Id.* at 601.

100. *Id.* "The order is an administrative act over which—unless third party rights are involved—the judiciary have no control; in particular, no court has jurisdiction to direct the issuance of an order." *Id.*

101. Rudden, *supra* note 81, at 603.

102. Section 24 of the 1937 Order states that "the right to use living accommodation in all buildings is formulated in a written agreement." *Id.*

103. *See id.* at 601.

Citizens received accommodations based on a waiting list.<sup>104</sup> Criteria for selection included the length of time on the list, and the number of family members.<sup>105</sup> The wait could last twenty to twenty-five years, but it could be shortened by bribery of the local authorities.<sup>106</sup>

The relationships between occupants of the same premises were similar to the American concept of joint tenancy,<sup>107</sup> with the difference being that Soviet citizens were not property owners. Even though the rental agreement listed only one name of the representative occupant, the whole family had equal rights to the premises.<sup>108</sup>

Each [member] is entitled to occupy an equal share of the dwelling, regardless of what room he actually uses; there can be no prescriptive right to a particular part of the accommodation. If, for some reason such as absence or death, the named tenant loses his right of occupation this does not affect the rest.<sup>109</sup>

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104. Getting on the waiting list was almost impossible for most of the population. If a family's sanitary norm of living space was satisfied, getting on the list was possible only through connections. Singles could not get on the list either and had to live with their extended family. Also, commuters who lived in the suburbs but worked in the city were not allowed to be on the list so as not to overcrowd the cities with provincial population. See Morton, *supra* note 56, at 75. For a general discussion of what criteria were used by Soviet authorities to determine who should receive housing, see Michael Alexeev, *Market vs. Rationing: The Case of Soviet Housing*, 70 REV. ECON. & STAT. 414, 416-19 (1988).

105. Rudden, *supra* note 81, at 601. The characteristic feature of the Soviet housing distribution was the unequal distribution of living space among various social groups. The professional specialists, government bureaucrats such as military officers, inventors, and distinguished scientists, artists, and engineers enjoyed housing privileges. On the other hand, the regular wage earners were in the worst housing position. See, e.g., Sosnovy, *supra* note 80, at 10-11.

106. See Alexeev, *supra* note 104, at 414 (stating procurement of housing in the USSR led to corruption, preferential treatment of certain persons, and improprieties. One could bribe the authority or could exchange apartments with a side payment).

107. An estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship. Because of this right of survivorship, upon the death of a joint tenant, the entire estate goes to the survivor or, in the case of more than two joint tenants, to the survivors, and so on to the last survivor. The estate passes free and exempt from all charges made by the deceased cotenant or cotenants.

20 AM. JUR. 2D *Cotenancy* § 4 (2008) (footnotes omitted).

108. One of the most curious features, however, of the housing lease is that the occupant named in the agreement is merely a representative for those members of his family who live with him. All rights and liabilities benefit and affect them equally with him, no matter when they settle in the dwelling.

Rudden, *supra* note 81, at 601.

109. *Id.* at 602. The question of who could be considered a family member was not settled. Some tenants would want to name a person as a family member so there will not be a surplus and it will not be taken away, and others did not want somebody to be declared as a family member in order to evict that person. Spouses and children were clearly family members. Thus, in order for a stranger to become a family member, a marriage had to be registered.



The relationships between occupants of the premises and the government can be compared to the American landlord-tenant relationships.<sup>110</sup> These relationships can be characterized as an American tenancy at will.<sup>111</sup> However, in contrast to American tenancy at will, where the landlord can terminate tenancy at any time,<sup>112</sup> the Soviet landlord could terminate tenancy only for cause. Such causes included: use of property in any way other than private living quarters,<sup>113</sup> absence from the property for more than six months,<sup>114</sup> systematic damaging of the living accommodations, misbehavior of the tenant, and nonpayment of rent for more than three months.<sup>115</sup>

### 3. Alienation of Property: Sale and Exchange

In the regimented Soviet housing system, citizens were restricted in where they could live and it was extremely hard for them to move or change their place of residence. There were two ways to change the place of living in the Soviet Union, and neither was an easy solution. First, the private single-family homes could be sold.<sup>116</sup> Second, the apartments in urban cities could be exchanged.<sup>117</sup>

After the revolution, some private homes remained under the ownership of individuals. Usually these were small family houses in rural areas that escaped the expropriation of 1918.<sup>118</sup> The main Act regulating these

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110. The relation of landlord and tenant generally arises from an agreement, or lease, which may be either express or implied, pursuant to which one person—the tenant or lessee—enters into possession and occupancy of the premises of another—the landlord or lessor—for a consideration, usually the payment of rent.

49 AM. JUR. 2D *Landlord and Tenant* § 1 (2008) (footnote omitted).

111. A “tenancy-at-will” is that which a tenant has by an entry made thereon under a demise to hold during the joint wills of the parties. It may be terminated at any time at the will of either party. . . . An attribute of a tenancy-at-will is that possession of the real property is for an indefinite period. A tenant-at-will is one who holds possession of the premises by permission of the owner, but without a fixed term.

*Id.* § 118 (footnotes omitted).

112. For details on termination of an American tenancy at will see *id.* § 119.

113. See Rudden, *supra* note 81, at 604.

114. *Id.* at 605.

115. *Id.* at 607–08.

116. See *id.* at 622.

117. *Id.* at 611.

118. Alexander Block, *Soviet Housing—The Historical Aspect*, 5 SOVIET STUD. 246, 259 (1954) (explaining that under Soviet rule the word “private” remained in general use to describe properties that were not nationalized because of their small size).

personal houses was "On the Right of Citizens to Buy and Build Individual Houses."<sup>119</sup> The main provisions of the Act allowed citizens the right to build or buy for personal ownership a one or two-story house with a maximum of five rooms.<sup>120</sup> The land upon which the house was standing was allotted for use without a time limit.<sup>121</sup> The paradox of the system was that while the house itself was privately owned, the land on which it stood belonged to the government. The Act contained some restrictions on sales and purchases of the houses.<sup>122</sup> The homeowners, including the purchaser, their spouse, and minor children, were allowed to own only one house at a time and could only sell a house every three years.<sup>123</sup>

Because there was no right to sell or buy a living accommodation provided by the government, Soviet citizens could improve their living conditions through a system of "exchanges." The process of exchange was very complicated and an individual had to have luck, patience, and cash.<sup>124</sup> To find a suitable place for exchange, individuals would place notices stating, "I am exchanging" all over kiosks, bus and trolleybus stops, and lamp posts.<sup>125</sup> To exchange apartments, each party had to obtain permission from the housing administration.<sup>126</sup> The administration granted permissions fairly easily so long as the transaction did not appear suspicious or designed to evade the laws on surplus.<sup>127</sup> Another prerequisite to housing exchange was *propiska*—an important feature of the Soviet housing regime which still has its place in the modern Ukraine. From a literal standpoint, *propiska* is simply a stamp in one's passport with their residency address. However, from a practical perspective *propiska* is a kind of a residency certificate that gives someone a right to work and live in a city.<sup>128</sup>

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119. *Id.* at 260. The act was passed in 1948 and was necessitated by failure to provide needed housing by socialist methods.

120. Rudden, *supra* note 81, at 615.

121. *Id.*

122. *Id.* at 622.

123. *Id.* at 615.

124. Morton, *supra* note 56, at 76.

125. See Henry W. Morton, *Who Gets What, When and How? Housing in the Soviet Union*, 32 SOVIET STUD. 235, 243 (1980). Sample exchanged bulletins read as "I am exchanging one two-room apartment for two one-room apartments in different districts."

126. See, e.g., Rudden, *supra* note 81, at 611.

127. *Id.*

128. Living in a city such as Moscow or Kiev was very desirable for many citizens of Soviet provinces. But because of overcrowding, large urban centers were closed to provincials through the system of *propiska*. See Morton, *supra* note 125, at 237. For a detailed discussion on how the Soviet Union controlled city size, see Elizabeth Clayton & Thomas Richardson, *Soviet Control on City Size*, 38 ECON. DEV. & CULTURAL CHANGE 155 (1989).

Obtaining *propiska* in a big urban city was no easy process for somebody from rural area.<sup>129</sup> To obtain it, a citizen had to have housing in that city.<sup>130</sup> Buying an apartment was not an option since all of the urban properties belonged to the government. Similarly, getting onto the waiting list to receive an apartment from the government was impossible because you had to have *propiska* to get on the list.<sup>131</sup> Therefore, in order to obtain *propiska* in the city, a Soviet citizen had to either marry somebody who lived in that city and was willing to add the spouse in their dwelling, or to arrange for an exchange of apartments.<sup>132</sup> To this day, the *propiska* exists in modern Ukraine as a rudiment of the Soviet regime.

### C. Privatization

The collapse of socialism began in the 1980s, after years of deficit, devastation, and general decay. On July 16, 1990, Ukraine declared its independence and in 1991, the parliament passed a Declaration of Independence which effectively ended the Soviet regime.<sup>133</sup> All of the former republics of the Soviet Union started their transformation from central planning to a market economy. This transformation to democracy and a market economy involved a number of political and economic changes.<sup>134</sup> The most significant part in the transformation to market

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129. See Morton, *supra* note 125, at 238.

The following is the story of a flat exchange between cities . . . . A family of three living in Moscow had a tragic car accident. The wife of the driver was killed, leaving the husband and his three year old son. The parents of the widower, living in Vladimir, about 100 miles from Moscow, wished to move to the capital to be with their son and grandson during this difficult period of adjustment. . . . After many months of trying, the grandfather, lacking a sponsor, failed to organize a flat exchange between Vladimir and Moscow. Finally he decided to use his influence and visited a number of prominent army colleagues in the capital. With their help and much money he was ultimately able to arrange an exchange chain, involving families in five cities, as part of which he and his wife were granted residence permits for a one-room flat in Moscow.

*Id.* at 238–39.

130. *Id.* at 238.

131. *Id.*

132. Without having a comparable apartment in a comparatively big urban city, the possibility of an exchange from a province was nonexistent. See *id.*

133. See Bondar & Lilje, *supra* note 4, at 3 (noting the independence of Ukraine was ratified in a national referendum by a ratio of nine votes to one).

134. See E.S. Savas, *Privatization in Post-Socialist Countries*, 52 PUB. ADMIN. REV. 573, 573 (1992).

economy was the emergence of private land ownership.<sup>135</sup> Thus, privatization of state-owned enterprises<sup>136</sup> and state-owned properties was the focus of the transformation.<sup>137</sup> The privatization of state property occurred in three areas: (1) privatization of land and assets in the agricultural industry, (2) privatization of housing, and (3) privatization of state-owned industrial and other non-agricultural property.<sup>138</sup>

The process of privatization is still taking place in all post-Soviet countries, and it is not going smoothly.<sup>139</sup> As one observer noted, “[p]rivatization is the sale of enterprises that no one owns, and whose value no one knows, to buyers who have no money.”<sup>140</sup> The questions regarding who should own a piece of property had to be resolved: whether a dwelling unit should belong to its current tenant, to the municipality, to a submunicipal district council, or to its prior owner.<sup>141</sup> Considering that private property was confiscated by the socialist state, the restoration of property to its original owners seemed to be the right choice.<sup>142</sup> However, restitution is essentially impossible in Ukraine since confiscation occurred more than seventy years ago.<sup>143</sup> Therefore, authorities decided that real property would be privatized according to the current residents who had *propiska*.

In 1992, the Ukrainian Parliament passed the Law “On Privatization of the State Dwelling Fund,” which gave the Ukrainian city residents the right to privatize dwellings that they were leasing from the government.<sup>144</sup> Only residents with a *propiska* stamped in their passports could privatize their apartments.<sup>145</sup> The process of privatization included filing out of

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135. See Bondar & Lilje, *supra* note 4.

136. For a detailed discussion of methods of privatization of state-owned enterprises, see Savas, *supra* note 134, at 573–76.

137. Josef C. Brada, *Privatization is Transition—Or Is It?*, 10 J. ECON. PERSP. 67, 67 (1996) (discussing views of proponents of creating large private sectors as quickly as possible in transition economies in order for democracy to develop. Otherwise the state’s managers of state-owned firms and former bureaucrats may sabotage economic reforms).

138. Bate C. Toms & Dmytro Korbut, *Privatization in Ukraine*, in *DOING BUSINESS WITH UKRAINE* 41, 41 (Marat Terterov ed., 3d ed. 2005).

139. Jessica Allina-Pisano, *Sub Rosa Resistance and the Politics of Economic Reform*, 56 WORLD POLITICS 554, 554–55 (2004) (discussing reasons why the change in post-communist societies faced political obstacles).

140. Savas, *supra* note 134, at 576 (quoting Janusz Lewandowski, Poland’s Minister for Ownership Changes).

141. *Id.* at 577.

142. *Id.*

143. *Id.* The original owners of properties could be displaced, exterminated or the records are unavailable. *Id.*

144. Bate C. Toms, Taras Dumych & Svitlana Kheda, *Ukrainian Real Estate Law*, in *DOING BUSINESS WITH UKRAINE*, *supra* note 138, at 295, 296.

145. Gary Roseman, *Ukraine’s Developing Mortgage Market*, 28 S. BUS. REV. 29, 29 (2003).

the required documents and paying a nominal amount of money.<sup>146</sup> Unexpectedly, housing privatization has not progressed quickly, even though it was available at a nominal price.<sup>147</sup> Such reluctance to privatize can be explained by citizens' fear and unfamiliarity with private ownership of real estate. Additionally, city residents dreaded that owners of privatized apartments would have to pay higher utility and maintenance costs than renters of unprivatized apartments.<sup>148</sup>

The government improved the privatization process in 2006. Until 2006, privatization involved the sale of state-owned properties, but not the land plots on which they were located.<sup>149</sup> In 2006, the executive branch introduced several changes to the laws regulating land aimed at implementing a mechanism for sale of land plots.<sup>150</sup> According to this mechanism, state privatization bodies would sell land plots at auctions, according to the specified procedure.<sup>151</sup>

#### D. The Emergence of a Mortgage Market

After the process of privatization gained its strength, the infrastructure for a mortgage market began to emerge. From the moment of privatization, the owner of the property is free to deal with it in any way she likes: use, mortgage, rent, or convey it.<sup>152</sup> However, the area of housing financing still remains in a primitive state.<sup>153</sup> This is especially

146. *Id.* Privatizations extended only to the apartments, whereas the common areas and building exterior remained the property of the municipality. *Id.*

147. Dwight M. Jaffee & Bertrand Renaud, *Strategies to Develop Mortgage Markets in Transition Economies* 1 (The World Bank, Policy Research Working Paper No. 1697, 1996), available at <http://faculty.haas.berkeley.edu/jaffee/Papers/Strategies Mortgage.PDF>.

148. *Id.*

149. See Andrey Kolupaev, Land Relations in Ukraine: 2006 Legal Regulation Trends, <http://www.lexwell.com.ua/node/100> (last visited Feb. 13, 2009); see also Roseman, *supra* note 145, at 29–30 (explaining that the country's rich agricultural lands remained unprivatized, which in turn created an obstacle for the development of Ukraine's agricultural potential).

150. Kolupaev, *supra* note 149.

151. *Id.*

152. See Toms, Dumych & Kheda, *supra* note 144, at 296.

153. The transformation of the planned economies of central and eastern Europe to market economies has focused on three key processes:

- 1) economic stabilization and liberalization,
- 2) privatization,
- 3) financial sector development.

discouraging considering the fact that in most developed countries, the mortgage markets account for the biggest part of the capital markets.<sup>154</sup> Such, in the United States, the biggest part of the internal debt market consists of the mortgage debt.<sup>155</sup>

One of the first types of mortgages were mortgages that financed apartments under construction.<sup>156</sup> The Arkada Bank provided these so-called mortgages.<sup>157</sup> The loans were given for two years with payment due at the time of move in.<sup>158</sup> By early 2002, fewer than ten banks provided mortgage financing in Kiev.<sup>159</sup> Usually, the terms of the loan included thirty to fifty percent down payment with the maximum mortgage term of five years with annual percentage rate of fourteen percent or more for loans tied to dollar.<sup>160</sup> The mortgage market was growing rapidly. In 2005, the volume of mortgages grew 3.5 times and the total number of banks throughout Ukraine offering mortgages grew to twenty or thirty.<sup>161</sup> Today, approximately one hundred banks provide financing for housing.<sup>162</sup> Still, the state of the Ukrainian mortgage market cannot withstand the comparison to the developed countries' markets.

One of the obstacles to the development of the mortgage market and the emergence of more favorable terms is the reluctance of banks to undertake risks. Such risks include debtor insolvency, liquidity risks and unreliable legal infrastructure.<sup>163</sup> The low income level of Ukrainian citizens who need to improve their housing is another significant reason

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The housing sector and its financial dimension, the mortgage market, have been a factor in each of these processes, although, sad to say, not always a positive one.

Jaffee & Renaud, *supra* note 147.

154. *Id.* at 2.

155. *Id.* In the United States, mortgages represent 34% of total debt instruments. *Id.* at 25.

156. *See* Roseman, *supra* note 145.

157. *Id.*

158. *Id.*

159. *Id.* at 30. Kiev, as the capital of Ukraine, represents the largest housing market.

160. *Id.*

161. Yuriy Gluxov, *Ob Ukrainskoy Ipoteke i Nexoroshem Slove* [About Ukrainian Mortgage and Bad Word] (Mar. 3, 2007), <http://www.ipoteka.net.ua/2007/03/03/ob-ukrainskoy-ipoteke-i-nehoroshem-slove/>.

162. Yevhenia Dyad'ko & Gary Roseman, *The Current State of Ukraine's Mortgage Market*, HOUSING FINANCE INT'L, Mar. 2007, at 33, 33, available at [http://findarticles.com/p/articles/mi\\_qa5441/is\\_200703/ai\\_n21288396](http://findarticles.com/p/articles/mi_qa5441/is_200703/ai_n21288396).

163. *See* Jaffee & Renaud, *supra* note 147, at 4 (analyzing the factors that hinder the development of mortgage markets in transitional economies). The authors offer a solution to the problem by developing a secondary market, which would reduce the risks of the banks associated with holding mortgage loans by selling the loans to other investors. Additionally, secondary market would create standards for credit evaluation and collateral procedures that increase efficiency of primary markets. *See id.* at 14.

for slow mortgage development in Ukraine. Also, the absence of a secondary mortgage market keeps the price of mortgages very high.<sup>164</sup>

Even though the average income of Ukrainian citizens has increased over the last several years, the disproportionate increase in housing prices makes housing loans unaffordable. The statistics show that only fifteen percent of the Ukrainian population could be viewed as potential mortgagors, while the other seventy-five percent cannot afford a mortgage.<sup>165</sup>

### III. MODERN LAWS REGULATING PROPERTY AND MORTGAGE

In the process of becoming an independent state, Ukraine went through a substantial change from a Soviet republic to an independent sovereign democracy with a market economy.<sup>166</sup> Because Ukraine is a civil law country that does not recognize precedent, it needs a clear and reliable framework of laws governing property ownership and property rights in order to mortgage land. Clear regulation of land will encourage economic and social development of urban and rural areas.<sup>167</sup>

After the dissolution of the Soviet Union, the Ukrainian Parliament worked hard on creating such a framework. Starting in 1991, the legislature enacted, and later repealed, rescinded, and changed a number of bills in search of a practical and working framework. Despite the progress already made, Ukraine needs to continue improving its legal infrastructure and regulatory framework in the real property area. Inconsistencies between laws, presidential decrees, and governmental orders, regulations, and other normative acts stand in the way of development of clear legislative resources.<sup>168</sup> Unclear laws and regulations create interpretation difficulties.<sup>169</sup> Another deficiency of the legal system is

164. See Dyad'ko & Roseman, *supra* note 162, at 34.

165. See Evtux O.T., *Ipotechniy Rinok Ukraini: Stan ta Perspektivi Rozvitku [Ukrainian Mortgage Market: Current Situation and Future Development]*, 47 VISNIK PODATKOVYI SLUZHBI UKRAINI 41-46 (2002) (Ukr.).

166. Simon Dodds, *Current Regulatory Issues: Selected Materials*, in PLI'S SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE INSTITUTE: A CONTRAST IN EU & US PROVISIONS 109, 211 (PLI Corporate Law & Practice, Course Handbook Series No. 8691, 2007), available at WL 1580 PLI/Corp 109.

167. See Bondar & Lilje, *supra* note 4.

168. See Dodds, *supra* note 166, at 216.

169. *Id.* (listing factors that hinder the country's development). Such factors include: unstable political situation, external debt, economic considerations like hyperinflation and a weak banking system, corruption and money laundering, and uncertainties related to the judicial system. *Id.* at 211-22.

the absence of judicial precedent and, as a result, the lack of direction in the interpretation of Ukrainian legislation.<sup>170</sup> Absence of precedent results in inconsistent court decisions.<sup>171</sup> Usually a legislative act is interpreted by the executive branch by way of regulations. However, the regulations are often implemented with considerable divergence from the main principles and guidance provided by the respective legislation resulting in a conflict with regulatory authorities.<sup>172</sup> One possible solution to these issues may involve looking to the American system of *stare decisis*. The problems with inconsistency could be reduced if Ukraine implemented some form of judicial precedence.

The main and fundamental law in Ukraine as in many other countries, is the constitution.<sup>173</sup> The new Ukrainian Constitution was enacted in 1996 for the first time in the post-Soviet Ukraine. The document recognizes many fundamental freedoms of citizens, including the right to private property.<sup>174</sup> Ukraine, similar to the other civil law countries, builds its legal framework around the codes.<sup>175</sup> The main framework for the regulation of mortgage is contained in the Civil Code, the Land Code, and specific laws pertaining to mortgage.<sup>176</sup>

### *A. Regulation of Land in Modern Ukraine*

The Land Code is a main legislative document which regulates land relationships. It recognizes private ownership of land and provides a framework for the use, purchase, and sale of land.<sup>177</sup> The Civil Code of

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170. Dodds, *supra* note 166, at 217.

171. *Id.*

172. *Id.*

173. Konstitutsiya Ukraini (1996) [Constitution], available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96-%E2%F0>.

174. *Id.* art. 41.

175. See Alexander Biryukov, *The Doctrine of Dualism of Private Law in the Context of Recent Codifications of Civil Law: Ukrainian Perspectives*, 8 ANN. SURV. INT'L & COMP. L. 53, 57 n.21 (2002).

176. There are different levels of laws in Ukraine. The main law is the Constitution, followed by codes that regulate general areas of legal relationships. The codes are followed by laws which are more specific and detailed in its sphere of regulation. Verhovna Rada of Ukraine (the Ukrainian Parliament) has the power to pass decrees as to how to implement the laws. The President of Ukraine has the power to issue ordinances in areas not regulated by laws. The ministers (heads of executive agencies) and other executive branch officials make orders and rules in specific industries that are binding within those industries. *Id.* Within this framework, the laws regulating mortgage relationships include, for example, the Laws of Ukraine on Mortgage, Pledge, and Securities & Exchanges.

177. Zemelnii Kodeks Ukraini [Land Code] (2002), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2768-14> (includes changes and additions until 2008). The Land Code defines ownership of land as the right of possession, use, and disposal. *Id.* art. 78.



Ukraine defines “real property” as land and objects located on land that are impossible to move without their depreciation and changing their designation.<sup>178</sup> The Land Code, even though progressive as a way of recognition of private ownership, contains many restrictions which slow down the development of security transactions involving land. One such limitation is that land can be used as security only in mortgage-type transactions and not in any other types of secured transactions.<sup>179</sup>

An important feature of the Ukrainian land regulation is that until recently it treated title to land and title to the buildings, structures, and other objects attached to the land differently.<sup>180</sup> Only recently the Land Code was changed and now provides that when a person acquires a house or any other structure she acquires it along with the land underneath it.<sup>181</sup> However, it is still very common that the owner of the structure is not necessarily is the owner of the land.<sup>182</sup> Moreover, the changes to the Land Code did not provide for change in real estate registration procedure. All real property transactions are subject to the State registration. However, the distinction between land ownership and the ownership of buildings results in separate registration of title to land and title to objects located on land.<sup>183</sup> Ownership rights to buildings, structures, and fixtures are regulated by the Civil Code and registered in the Register of Titles of Ownership to Real Estate Objects, which is administered by the Bureau of Technical Inventory.<sup>184</sup> Titles and use rights to land, on the other hand, are regulated by the Land Code and registered by local branches of the State Land Cadastre Center.<sup>185</sup> The

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178. Civilnyi Kodeks Ukraini [Civil Code] art. 181 (2003), available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=435-15> (includes changes and additions until 2008). The Civil Code of Ukraine could be compared to the UCC in its sphere of regulation. The Civil Code regulates personal non-property and property relations. It defines the ownership right as a person's right to the thing (property) which she/he exercises according to the law and his/her will regardless of the other person's will. *Id.* art. 316.

179. See Roseman, *supra* note 145, at 30.

180. KARL HEPP DE SEVELINGES ET AL., GIDE LOYRETTE NOUEL, REAL PROPERTY INVESTMENT LAW IN UKRAINE 3 (2008), [http://www.europe-re.com/files/00034800/GLN\\_Ukraine\\_RealPropertyInvestmentLaw\\_%20April2008.pdf](http://www.europe-re.com/files/00034800/GLN_Ukraine_RealPropertyInvestmentLaw_%20April2008.pdf) [hereinafter GLN].

181. Land Code art. 120.

182. GLN, *supra* note 180.

183. *Id.* at 4.

184. See *id.*

185. Land Code art. 193. The Land Code defines State Land Cadastre as a unified state system of land-cadasterial works, which provides a procedure for determining emergence and termination of land ownership rights and right of use. It includes information about location, legal status of pieces of land, its estimate, classification,

problem is that Ukrainian Parliament has yet to pass the law on the State Land Cadastre Center, without which the Cadastre Center cannot effectively function.<sup>186</sup> As a result, land transactions are not always properly recorded. Such distinction between the legal status of land and its attachments, as well as inadequate legislative regulation, complicates the estimation of land value and title search for mortgage purposes.

In contrast to the different legal status of land and its fixtures in Ukraine, in the United States “[t]he word ‘land’ includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by human hands, as buildings, fixtures, and fences. The common-law meaning of the term ‘land’ is substantially synonymous with ‘real property.’”<sup>187</sup> Accordingly, in American jurisprudence, the term “land” is much broader than its literal meaning, and it may comprise of many other things in addition to the soil itself, such as waters, stones, vegetation, items attached to the land, and all elements that became part of the soil.<sup>188</sup> Fixtures are also considered to be part of real property or piece of land for mortgage purposes.<sup>189</sup> A fixture “constitutes part of the mortgaged land and is subject to the mortgage lien without additional description.”<sup>190</sup> Such combined treatment of land and its fixtures eliminates unnecessary complications in registration, estimation of the value of real property, and title search.

Another feature of the Ukrainian Land Code which negatively influences mortgage development is the differentiation between various types of land. The Land Code divides land into categories based upon its purposeful designation.<sup>191</sup> These categories include agricultural lands, lands used for housing and commercial building, natural reserves and

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quality and division between common owners. However, for the State Land Cadastre system to work, the Parliament of Ukraine has to implement the law on State Land Cadastre. To this day the law has not been passed.

186. In August of 2003, Verhovna Rada of Ukraine (Ukrainian Parliament) issued a decree to treat the bill on State Land Cadastre as a basis for the law. *Postanova Verhovnoy Radi Ukraini Pro Priynyattya za Osnovu Proektu Zakonu Ukraini Pro Derzhavniy Zemelniy Kadastr No. 1056-IV [Decree to Treat the Bill on State Land Cadastre as a Basis for the Law on State Land Cadastre]*, July 9, 2003, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1056-15>. However, as of the beginning of 2008, the law has not been passed. See generally Official Website of Verhovna Rada of Ukraine, <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi> (last visited Feb. 13, 2009).

187. 63C AM. JUR. 2D *Property* § 12 (2008) (footnote omitted).

188. *Id.*

189. JON W. BRUCE, *REAL ESTATE FINANCE IN A NUTSHELL* 100 (5th ed. 2004). “A fixture is an item of tangible personal property that becomes realty by virtue of its attachment to land with the intent it remain permanently affixed.” *Id.*

190. BRUCE, *supra* note 189.

191. *Zemelniy Kodeks Ukraini [Land Code]* art. 19 (2002), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2768-14> (includes changes and additions until 2008).

other environmental protection use lands, lands used for industrial, transportation, communication, energy purposes, recreational use lands, and forestry lands.<sup>192</sup> Depending on the category of land, the code provides different rules of acquisition, registration, and securitization of land plots. The category determination for a particular piece of land is performed by authorized state agencies on land resources.<sup>193</sup> The landowners may also initiate a proceeding to change the purposeful designation.<sup>194</sup>

This type of land designation is similar to the American system of zoning laws. Zoning in the United States is “the most common form of local land use control. The city or county . . . is divided geographically into zones (districts), and different use regulations apply in each zone.”<sup>195</sup> One type of zoning regulation is the regulation on activities. The theory behind zoning is that certain land uses cannot be compatible with others and as a result have to be separated.<sup>196</sup> For example, residential areas should not be commingled with industrial and commercial areas.<sup>197</sup>

In Ukraine, however, the differentiation between categories of land carries bigger limitations and is justified by a different theory. One of the main reasons for land designation is to preserve valuable agricultural lands and protect Ukrainian land from foreign acquisition.<sup>198</sup> Foreign individuals, foreign legal entities and joint ventures established by Ukrainian and foreign persons are not allowed to own agricultural land.<sup>199</sup> Agricultural land received as inheritance by foreigners must be alienated within one year.<sup>200</sup> Foreign legal entities may acquire an

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192. *Id.*

193. *Id.* art. 20.

194. *Id.*

195. BERNHARDT & BURKHART, *supra* note 48, at 390. “Zoning ordinances generally regulate the size and shape of the land, the size and shape of improvements on the land, and the type of activity that can occur on the land or in its improvements.” *Id.* at 391.

196. BERNHARDT & BURKHART, *supra* note 48, at 395.

197. *Id.*

198. The fact that Ukrainian agrarian lands are exceptionally fertile is very well known. Even during World War II, Hitler literally shipped by trains Ukraine’s soil to Germany. Agronomists say that if Ukrainian lands were efficiently cultivated they could produce twenty percent of the world’s current wheat production. However, local citizens do not have resources to cultivate land according to modern technologies and foreigner investors are prohibited from acquiring agricultural land. The only option left for foreign investors is to lease the agricultural land from private parties. See John W. Miller, *Bread Basket: In Ukraine, Tiny Plots of Farmland Spur Big Bet*, WALL ST. J., May 12, 2008, at A1.

199. Land Code art. 22.

200. *Id.* art. 81.

ownership to non-agricultural land within settlement boundaries only in cases of acquisition of buildings or structures, or for the purpose of construction of facilities related to the execution of their business activities in Ukraine.<sup>201</sup> This limitation ignores the huge need for construction of new housing because it prevents land development and foreign investment.

Another tremendous limitation on acquisition of land in the Land Code is a moratorium on the sale of certain types of agricultural land, particularly farming land.<sup>202</sup> The moratorium covers transactions by Ukrainian and foreign citizens.<sup>203</sup> It prohibits acquisition or sale of land characterized as farmland except when such acquisition is for public use.<sup>204</sup> The ban also prohibits modifying or rezoning farming land plots owned by individuals or legal entities.<sup>205</sup> As a result, the moratorium is one of the main inhibitors in development of mortgages for land.<sup>206</sup> Technically, there is no law prohibiting the mortgaging of land; however, because banks are unable to foreclose on such lands, the moratorium on the sale of land effectively precludes land mortgaging. In 2007, the use of mortgages to finance land purchases comprised only ten percent of all mortgages issued, and only ten Ukrainian banks started to develop services for land mortgages in 2007.<sup>207</sup> As a result of such legislative limits on sales of certain lands, the land, the most valuable property in Ukraine, is not part of the mortgage market.

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201. *Id.*

202. *Id.* transitional provisions cl. 15. The moratorium was originally scheduled to expire in 2006, and then it was extended several times until January 2008. The last amendment to the Land Code in June of 2008 extended the term of moratorium until the passage of the law on Land Cadastre; the law has not been passed yet. Also, in February 2006, changes were made to the “transitional provision” of the Land Code of Ukraine, eliminating a gap in the law. Prior to the 2006 changes, clause 15 of the “Transitional Provisions” prohibited only the sale or alienation of farm land plots other than through inheritance or public use taking. However, in reality owners of such land often effectively “sold” it by issuing an irrevocable power of attorney for alienation of such land plots. The 2006 changes established that any agreement—including power of attorney—entered into during the moratorium for the purpose of alienation of specified land plots is invalid. See Kolupaev, *supra* note 149.

203. Land Code transitional provisions cl. 15.

204. *Id.*

205. *Id.*

206. *Ipoteka Uxodit v Zemly [Tendency of Land Mortgages]*, RICARDO, Oct. 1, 2007, <http://www.ricardo.com.ua/money/credits/20477>. Ukrainian citizens increasingly attempting to purchase land under credit. However, limitations in Land Code on sale of agricultural lands and unclear regulation of credits for land inhibit such tendency.

207. *Id.* Financing of land purchases usually has a term of up to twenty years and a minimum of fourteen percent finance charges. It also requires a forty percent down payment.

*B. Laws Regulating Mortgages*

The first post-Soviet law that mentioned mortgages was the Law of Ukraine on Pledges enacted in October of 1992.<sup>208</sup> This law represented an important step toward regulation of secured transactions and a first sign of formation of a legal framework on this subject. The Law on Pledges regulated secured transactions up until the Law on Mortgage was enacted in 2004. The Law on Pledges also regulated mortgage relationships. This law was not sufficiently detailed and could not to provide for a clear and reliable mechanism for the issuance of mortgages and therefore was certainly not a perfect model for housing financing regulations. Even though banks were willing to finance some houses in very rare situations, these operations were very risky for banks' creditors because the Law on Pledges did not provide a mechanism for satisfaction of creditor's demands. Additionally, the Law on Pledges did not provide any framework for financing of agrarian lands. The Law on Pledges also failed to provide for a uniform, easily accessible and reliable mechanism for registering a pledge in order to give adequate notice to third party creditors.

The modern Ukrainian legal framework for secured transactions is based primarily on significant changes that were introduced into Ukrainian jurisprudence in 2003 by passing the law On Mortgage.<sup>209</sup> The Law on Mortgage expanded on the financing regulations contained in the Law on Pledges. The legal framework of Ukrainian mortgage law now comprises of the Constitution, the Civil Code, the Economic Code, the Land Code, the Law on Mortgage, and other laws.<sup>210</sup> The Law on Mortgage sets up detailed rules regarding mortgages as a legal instrument for securing commercial transactions regardless of their nature. The law defines a "mortgage" as a type of security for immovable property that remains in possession and use of mortgagor, allowing the mortgagee in case of a default to satisfy its demand through such

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208. Zakon Ukraini Pro Zastavu [On Pledges], Vidomosti Verkhovnoyi Radi [VVR] 1992, No. 47, p.642, available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2654-12&p=1235376950177302>.

209. Zakon Ukraini Pro Ipoteku [On Mortgage], Vidomosti Verkhovnoyi Radi [BBP] 2003, No. 38, p.313, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=898-15&p=1198099302619378> (includes changes and additions until 2006). The law was passed in 2003 and entered into force on January 1, 2004.

210. *Id.* art. 2.

property.<sup>211</sup> A mortgage may arise on the basis of an agreement, a court decision, or by operation of law.<sup>212</sup>

### *1. Power to Mortgage Property*

The law On Mortgage provides that a person has the power to mortgage a piece of property only when the following conditions are met: (1) the property is owned by the mortgagor, (2) the mortgagor can sell the property, and (3) the property is registered according to the law.<sup>213</sup> Accordingly, one can mortgage only those property interests over which one has full ownership and power of disposal. A Ukrainian mortgagor is therefore not able to finance any interest which is less than a fee simple absolute. For example, a mortgagor cannot use a leasehold interest, a life estate, or an easement as a security.

Comparatively, the general American mortgage principles provide that any kind of interest in real estate capable of passing by purchase or descent can be mortgaged.<sup>214</sup> The only requirement is that the mortgagor have some kind of interest in the property capable of being mortgaged at the time of the transaction.<sup>215</sup> Such a right could be a right to acquire property in the future, or the right of redemption from a judicial sale.<sup>216</sup> The creditor in this situation is protected because the mortgage would not cover any rights or interests except those that the mortgagor has or acquires in the future.<sup>217</sup>

By imposing fee simple absolute restrictions, Ukrainian law narrows the scope of property interests that can be mortgaged. This reduces the choice of transactions that can be entered into, and therefore negatively impacts the development of mortgages in Ukraine. Furthermore, the law places the burden on the lender to determine whether the mortgagor has the power to mortgage his or her property. The three requirements placed on the mortgaged property—ownership, ability to sell, and proper registration—are necessary conditions for the mortgagee to be able to enforce the obligation under mortgage. Therefore, if the lender issues a mortgage on any interest less than full ownership, it forfeits its security. This makes banks even more reluctant to issue mortgages.

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211. *Id.* art. 1.

212. *Id.* art. 3.

213. *Id.* art. 5.

214. 54A AM. JUR. 2D *Mortgages* § 34 (2008).

215. *Id.*

216. *Id.*

217. *Id.*

## 2. Parties to the Mortgage Agreement

According to Article 1 of the Ukrainian Law on Mortgage, the parties to the mortgage agreement are called mortgagee and mortgagor.<sup>218</sup> Both parties can be natural persons, legal persons or government entities. The mortgagee is a creditor, whereas the mortgagor is the debtor. The law also provides for existence of a third party to the mortgage agreement—the guarantor.<sup>219</sup>

The law establishes that the guarantor takes a mortgage to satisfy the debt of a third person while the debtor takes the mortgage in satisfaction of his or her debt.<sup>220</sup> Whether the guarantor is a party to the mortgage agreement is not clear from the Law on Mortgage and is currently the subject of discussion among Ukrainian legal scholars.<sup>221</sup> Because the guarantor's liability is limited to the value of the immovable property that was mortgaged, the guarantor is not personally liable.<sup>222</sup> In case the value of the mortgaged property is less than the amount of the loan, the mortgagee can demand satisfaction of the rest of debt from the debtor personally, but has no recourse against the guarantor.

The legal relationship between the debtor and guarantor is not defined by the Law on Mortgage. However, the term “guaranty” is defined in the Civil Code as an independent type of security which provides for satisfaction of an obligation.<sup>223</sup> Thus, if the Civil Code's definition is applied to the mortgage relationships, guaranty in mortgage agreement would seem to be an additional method of securitization of an obligation.<sup>224</sup> After the creditor's demands are satisfied by the guarantor according to the mortgage agreement, the relationship between the creditor and the debtor is terminated.<sup>225</sup> At the same time, the guarantor receives the right to demand restitution from the debtor.<sup>226</sup>

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218. On Mortgage art. 1.

219. *Id.*

220. *Id.*

221. Xodiko Uriy, *Storoni v Dogovori Ipoteki, Ixni Prava ta Obov'yazki* [Parties to the Mortgage Agreement, Their Rights and Duties], 4 JUSTINIAN (2006), available at <http://www.justinian.com.ua/article.php?id=2226>.

222. On Mortgage art. 11.

223. Civilnyy Kodeks Ukraini [Civil Code] art. 553 (2003), available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=435-15> (includes changes and additions until 2008).

224. Xodiko, *supra* note 221.

225. *See id.*

226. *See id.*

### 3. Mortgageable Property

Under the Law on Mortgage, various types of immovable property, including land, may be subject to mortgage.<sup>227</sup> It has to be noted that only immovable property can be the subject of mortgage under the law.<sup>228</sup> For the first time in Ukrainian law, the Civil Code defined immovable property as land and fixtures attached to it.<sup>229</sup> In addition to the traditional definition of real property and land, the Law on Mortgage also defined the right of lease or use—which entitles the lessee or a person using immovable property to build, possess and dispose of immovable property—as immovable property that may be mortgaged.<sup>230</sup> The mortgaged property remains in the use and possession of the mortgagor who can use the pledged property only according to its designation.<sup>231</sup>

Unlike the Land Code differentiation between the legal status of structures on land and the land underneath them, the Law on Mortgage purports to unify the status of land and its structures. If a mortgagor of premises owns the underlying land plot, the mortgage also extends to such land plot.<sup>232</sup> On the other hand, if the land plot is not owned by the mortgagor, the enforcing mortgagee is entitled to claim the same rights to the land plot that were vested with the defaulting mortgagor.<sup>233</sup> For example, if the land underneath the mortgaged building was leased by the mortgagor, the mortgagee would succeed to the lease agreement.

Similarly, the mortgage of a land plot also extends to the real property owned by the mortgagor of the land plot.<sup>234</sup> If the real property located on such land plot is owned by a party other than the land plot's mortgagor, the enforcing mortgagee must provide such an owner with the same rights to the land plot as it had under the defaulted mortgagor.<sup>235</sup> For example, if the mortgagor—owner of the land plot—had a lease agreement with the person who owned a building located on the land, the mortgagee would have to provide the lessee with the same terms of the lease as the mortgagor did. Mortgage of a land plot also

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227. On Mortgage art. 1.

228. Securitization of movable property is not considered to be mortgage, but a pledge, which is regulated by a different set of laws such as the Law on Pledges.

229. *Civilniy Kodeks Ukraini* [Civil Code] art. 181 (2003), available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=435-15> (includes changes and additions until 2008).

230. On Mortgage art. 5.

231. *Id.* art. 9.

232. *Id.* art. 6.

233. *Id.*

234. *Id.*

235. *Id.*



extends to an objects of unfinished construction located on the land plot, regardless of whether the mortgagor of the land owns the object.<sup>236</sup>

The combined treatment of land and its structures is a positive part of the Law on Mortgage. This unified treatment of land plots and buildings should eventually result in the unification of lands and buildings in all spheres of real estate transactions, including the registration of rights on property and its land. Unified treatment would reduce the complexity and confusion in registration of property rights. Due to this notion of unity, the land becomes a part of the mortgage transaction and therefore part of the mortgage market. The land value presumably now should be included in the determination of a loan amount and therefore such value would be easier to determine for other land transactions.

One question left unresolved by the Law on Mortgage is the determination of land plot boundaries for mortgage purposes.<sup>237</sup> For example, it is unclear whether the whole land plot—including backyard and frontyard—becomes part of the mortgage, or whether the mortgage extends only to the land underneath the mortgaged building.<sup>238</sup>

While the Law on Mortgage is progressive with respect to land, all of the restrictions on land transactions listed in the Land Code are applicable to mortgage transactions. The Law on Mortgage specifically states that “[p]rohibitions and limitations with respect to land disposition and its division according to the designated use, provided in the Land Code, are enforceable with respect to mortgage transactions.”<sup>239</sup> As discussed earlier, because the land is divided into categories by its purpose, it accordingly has limitations on its use and acquisitions.<sup>240</sup> For example, ownership of agrarian land is restricted: to own agrarian land, one must be a Ukrainian citizen, and be either educated in agrarian land use or have practical experience in the area.<sup>241</sup> Thus, in case of a default by a mortgagor who financed agrarian land, the bank would have difficulties with disposition of such land because only specific categories

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236. *Id.*

237. See Maskim Surzhinsky, *Teoretichni ta Practuchni Aspektu Zastosuvannya Ipoteku* [Theoretical and Practical Details in Application of Mortgage Law], 6 JUSTINIAN, June 2004, available at <http://www.justinian.com.ua/print.php?id=1244>.

238. *Id.*

239. On Mortgage art. 15.

240. See *supra* Part III.A.

241. *Zemelniy Kodeks Ukraini* [Land Code] art. 130 (2002), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2768-14> (includes changes and additions until 2008).

of buyers can purchase it.<sup>242</sup> Also, the bank itself will not be able to buy the property.<sup>243</sup> As a result, banks do not finance agrarian land at all.

#### 4. *Creation of a Mortgage Agreement*

The mortgage agreement is the main document in a mortgage transaction and must be executed in writing. The agreement becomes effective from the moment of its notarization, at which time the mutual rights and obligations of a mortgagor and mortgagee arise under the mortgage agreement.<sup>244</sup> Each mortgage agreement must contain certain mandatory terms which, if not included, may result in the invalidation of the agreement.<sup>245</sup> Such mandatory provisions include: information about the parties to the agreement, the substance and value of the principal obligation, the term and method of performance of obligation, and a description of the mortgaged property.<sup>246</sup> If the mortgaged property is land, then the parties have to note its designation according to the Land Code.<sup>247</sup> The weakness of the Law on Mortgage is that it requires only minimal information to be included in the agreement for it to be valid, but it does not provide a mechanism for determining other important provisions not specified by the agreement. Here, the Ukrainian system would benefit from adopting rules which provide for gap filler, such as those in Uniform Commercial Code.

Notarization is an important part of the transaction. Without the notarization, the whole transaction is invalid. The notarization process in Ukraine differs from the one conducted in the United States. Unlike its American counterpart, the Ukrainian notarization process is very important and complicated part of the transaction. For example, a notary public in Ukraine is a person with a law degree who performs a "quasi-judicial" function.<sup>248</sup> A notary is a neutral party to the transaction who verifies that legal demands are satisfied and that the transaction is performed according to the law. Notarization is similar to the escrow process in the United States when all of the needed documents are gathered together in order to perform the final steps of effecting a transfer or encumbering of real property.<sup>249</sup>

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242. See Surzhinsky, *supra* note 237.

243. See *id.*

244. On Mortgage art. 3.

245. *Id.* art. 18.

246. *Id.*

247. *Id.*

248. James J. Ammeen Jr., Comment, *Modern Russian Secured Transaction Law and Foreign Investors' Rights Thereunder*, 4 IND. INT'L & COMP. L. REV. 371, 382 (1994).

249. An "escrow" is defined in the California Financial Code, and similarly in other states, as:

Because of unclear legal guidance, the process of notarization is not only complicated and time consuming for the parties of the transaction, but also presents difficulty to the notary public. Notarization of mortgage transactions is a new function for notaries, and there is no clear legal scheme or practical guidance on how to perform such procedures.<sup>250</sup> Under the Law on Mortgage, the mortgage agreement may be included in the contract for the principal obligation. In reality, however, notaries are not familiar with such practice.<sup>251</sup> More often, the principal obligation is covered by the credit contract and the terms of the mortgage are covered by the mortgage agreement.<sup>252</sup> Another important document which notaries demand from the mortgagor is a copy of the public record from Registry of Titles to Real Property verifying the mortgagor's ownership of the property.<sup>253</sup> None of the laws, however, define what documents must be provided to verify ownership of a piece of land when such land is the subject of a mortgage agreement. It seems logical that the mortgagor would have to give a copy of the public record from the State Land Cadastre Center where land transactions would be registered. Unfortunately, as it was mentioned earlier, the Ukrainian Parliament has not passed the law on the State Land Cadastre Center. Thus, because of the absence of the unified registration system, to protect the parties to the agreement, the notary has to check all of the possible registers.<sup>254</sup> Such registers include: the State Register of Transactions, the Register of Titles of Ownership to Real Estate Objects, the State Land Cadastre, and the Register of Mortgages.<sup>255</sup>

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any transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter.

CAL. FIN. CODE §17003(a) (1999).

250. Olga Gribanova, *Primenenie Ipoteki Notariusami: Aktualnie Voprosi Pravovogo Regulirovaniya Instituta Ipoteki i ee Primenenie Notariusami*, 12 URIDICHESKAYA PRAKTIKA (2005), available at <http://www.yurpraktika.com/article.php?id=10004453>.

251. *Id.* at 1.

252. *Id.*

253. *Id.*

254. See GLN, *supra* note 180, at 4–5.

255. *Id.* at 4.

During the recordation of a mortgage agreement, the notary public places interdiction on disposition of property subject to the mortgage and records this information in State Registry of Prohibitions of Alienation of Immovable Property.<sup>256</sup> This is another document and another redundant registry that has to be consulted during the execution of a mortgage agreement.

Legally, a notary public can simultaneously perform notarization of two transactions: a purchase transaction and a mortgage transaction.<sup>257</sup> This procedure, although performed every day in the United States, is practically impossible in Ukraine. At the time of notarization, the mortgagor has to provide the notary with a copy of record from Register of Titles of Ownership to Real Estate Objects, the State Land Cadastre which verifies the debtor's ownership of property. This is impossible when the purchase agreement is entered into contemporaneously with the mortgage agreement because the mortgagor's ownership right to the property has not yet been registered.<sup>258</sup> Here is another example of the many inconsistencies in the Ukrainian law. The Law on Mortgage allows for property to be subject to mortgage agreement if the mortgagor becomes the owner after the execution of a mortgage agreement.<sup>259</sup> This is impossible in practice, however, since the mortgage agreement will not be notarized without a copy of the public record from the Registry. Such a mortgage will therefore not be legally valid.

In the United States, as in Ukraine, every purchase, sale, and financing of real estate involves the transfer of various documents and monies. In most states of the United States including California, the use of an escrow is considered to be the easiest and most efficient method for consummation of purchase and sale of real property or land.<sup>260</sup> In California, for example, escrows are regulated by the Department of Corporations and the Commissioner of Corporations.<sup>261</sup> Escrows can be owned and operated by title insurance companies,<sup>262</sup> lending institutions,

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256. See Surzhinsky, *supra* note 237.

257. Berezhna Irina, *Ipoteka yak Zona Pidvishenoï uvagi dlya systemi notariatu*, 2 JUSTINIAN (2007), <http://www.justinian.com.ua/print.php?id=2549>.

258. *Id.*

259. Zakon Ukraini Pro Ipoteku [On Mortgage], Vidomosti Verxovnoyi Radi [BBP] 2003, No. 38, p.313, art. 5, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=898-15&p=1198099302619378> (includes changes and additions until 2006).

260. See, e.g., DENNIS L. GREENWALD & MICHAEL ASIMOW, CALIFORNIA PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS § 4:561 (2005).

261. *Id.* § 4:566.

262. In California title insurance companies conduct search of the chain of title to property and issue title insurance which provides protection to an owner of an interest in property against loss due to certain title defects, liens and encumbrances affecting the property. Title insurance companies also may perform escrow services. See *id.* § § 3:35--45.

or unaffiliated escrow companies.<sup>263</sup> Consumers may prefer using a title insurance company escrow because these companies have experience with such transactions and can coordinate their actions with the title side of the transaction.<sup>264</sup>

Creation of similar escrow companies in Ukraine would be very helpful in the development of Ukrainian mortgage law. First, because they would only conduct transactions related to the transfer of rights in real property, they would therefore have the requisite time and means to learn all legal details related to mortgage transactions. In contrast, today this procedure is performed by notaries who do not have any experience, time, or resources to ensure knowledge of all legal details that may arise in executing such transactions. Second, because there currently are no title insurance companies in Ukraine, there is no method to ensure against unclean title and verify that the property actually belongs to the person claiming it. This risk falls on banks and therefore makes banks hesitant to participate in housing financing.

### *5. Registration and Priority*

In the United States, registration is one of the main components of the mortgage process. In order to resolve problems of priority,<sup>265</sup> every state in the United States has enacted a statutory recording system.<sup>266</sup> The recording system creates incentives to record certain documents in order to secure priority over prior transfers.<sup>267</sup> In order to record a transaction that affects title to land,<sup>268</sup> the document is filed at the recorder's office or other designated depository in the county where the land is located.<sup>269</sup>

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263. *See id.* §§ 4:568–:570.

264. *See id.* § 4:568.

265. Priority problems arise when the transferor (1) grants partial interests in the property to successive transferees, such as when the owner gives a mortgage on the property to one person and then gives a mortgage on the same property to another person, (2) purports to transfer the entire estate to different persons, such as when the owner conveys the property to one person and then conveys the same property to another person, or (3) transfers partial and total interests in the same land, such as when the owner gives a mortgage to one person and then conveys the fee title to another person.

BERNHARDT & BURKHART, *supra* note 48, at 297.

266. *Id.* at 299.

267. *Id.*

268. Some of the transactions and documents that affect title to land include deeds, leases, mortgages, contracts for sale of land, quiet title decrees, judgment or tax liens, and lis pendens. *Id.* at 304–05.

269. *Id.* at 304.

The recordation process includes several steps:

[t]he recorder's office makes a copy of the entire document. This copy is then inserted into the current book of official records. These record books, consisting solely of copies of documents, are kept and labeled in chronological order. When one book is filled, a new book is started and is given the next number.<sup>270</sup>

This system provides for a uniform and reliable framework of recordation and is a critical part of real estate transactions.

Ukrainian laws provide for a system of recordation as well. However, the uniform system of recordation, is not in place yet and is one of the main problems of mortgages. Under the Law on Mortgage, all mortgages are required to be registered in the state registry in order to secure priority.<sup>271</sup> At the same time, failure to register a mortgage does not result in the invalidation of the mortgage.<sup>272</sup> Rather, failure to register affects the creditor's ability to secure priority before other secured creditors.<sup>273</sup> The shortcoming of the Law on Mortgage in this area is that it does not provide for a clear and comprehensible legal structure of registration, which in turn creates many uncertainties and inconsistencies.

At first glance, the provision of the Law on Mortgage stating that a mortgage agreement is valid even if the registration has not been performed does not seem to present any problems. However, the Civil Code states that a legal act is considered to be valid from the moment of its registration.<sup>274</sup> At the same time, the Civil Code does not state that the law can create a different rule.<sup>275</sup> The plain meaning of the Civil Code seems to be that a mortgage agreement can be considered valid only from the moment of its registration. Yet the Law on Mortgage states that registration is not required and that mortgage agreement is valid from the moment of its notarization. Which law prevails in this conflict and how to resolve this inconsistency between the two Ukrainian statutes is a question to be resolved by the Ukrainian Parliament. Until then, the parties to the transaction can only hope that this inconsistency does not become the subject of a disagreement.

The Law on Mortgage states that State registration has to be performed by the person who has the duty to do so, as required by

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270. *Id.* at 305.

271. Zakon Ukraini Pro Ipoteku [On Mortgage], Vidomosti Verxovnoyi Radi [BBP] 2003, No. 38, p.313, art. 4, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=898-15&p=1198099302619378> (includes changes and additions until 2006).

272. *Id.*

273. *Id.*

274. Civilnyi Kodeks Ukraini [Civil Code] art. 210 (2003), *available at* <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=435-15> (includes changes and additions until 2008); *see also* Surzhinsky, *supra* note 237.

275. Surzhinsky, *supra* note 237.

law.<sup>276</sup> The law does not state who in fact has such a duty. At this time, mortgages are registered by the mortgagee (since the registration is in the interests of the mortgagee) with the temporary State Registry of Mortgages, administered through the "Information Center" of the Ministry of Justice.<sup>277</sup> It was expected that by the year 2007 the existing temporary registration systems would be replaced by a new comprehensive cadastre-based system which would combine the registration of any rights and limitations on immovable property. As of today, however, the new system has not been created.

In its message to Ukraine, the World Bank encouraged the State to introduce a unified system for registration of rights in land and real estate in the year of 2008.<sup>278</sup> However, to introduce such a system, the Ukrainian legislature needs to authorize some state agency to register such rights. Today, the land registration is governed by the State Agency of Land Resources, while the registration of rights in real estate and mortgages is regulated by the Ministry of Justice.<sup>279</sup>

To sum up, the comprehensive system of registration of property rights which would secure and promote availability of mortgages has not been created. The government has not specified which single authority should be responsible for registration of secured transactions. The main problem with registration is that there is no single registry of the property rights for immovable property. Ownership rights to buildings, constructions, and fixtures are registered in the Registry of Titles to Real Property; ownership rights to land are registered by the local branches of the State Land Cadastre Center; mortgages are registered with the temporary State Registry of Mortgages. Such a complicated and discordant system of registration cannot provide reliability and effectiveness. The system of mortgage registration that aims at the protection of creditor's rights does not seem effective and reliable. With such a deficient system of registration, Ukrainian real estate transactions are doomed to continue having title disputes unless the experience of other countries is

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276. On Mortgage art. 4.

277. Postanova Kabinetu Ministriv Ukraini No 410 Pro Zatverdzhennya Timchasovogo Poryadku Derzhavnoi Reestrazii Ipotek vid 31 Bereznya 2004 [Decree of Executive Branch Regarding Temporary State Registration of Mortgages] (Mar. 31, 2004), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=410-2004-%EF>.

278. The World Bank Group, World Bank Supports Land Reform in Ukraine, <http://lnweb90.worldbank.org/ECA/eca.nsf/66d6f5004ed085ca852567d10011a8b8/4d762a1b99c44c6885256d50007258cf?OpenDocument> (last visited Mar. 12, 2009).

279. *Id.*

considered and careful legal work is conducted. The registration system should be unified, and should allow registering different types of transactions affecting title to real property in the same place.

## 6. Enforcement

The main feature of the mortgage concept is that the mortgagee has the power to satisfy the debt through the sale of the secured property in case of the mortgagor's default. This feature of mortgage is universal to all systems of law, but the ways of enforcement of the debt differ from system to system.<sup>280</sup> In the United States and specifically California, for example, there are two main methods of debt satisfaction: non-judicial sale and judicial foreclosure.<sup>281</sup> Non-judicial sale involves a private sale of secured property, while judicial foreclosure is the sale of property pursuant to a court decision.

Article 1 of the Ukrainian Law on Mortgage provides for a mortgagee's power to satisfy the debt in case of mortgagor's default.<sup>282</sup> The Law on Mortgage adds new methods of enforcing obligations. In addition to the conventional methods of enforcement through judicial sale, the Law on Mortgage provides for enforcement by a notarial writ of execution or, according to an agreement between the parties, such as by acquiring the right of ownership to the collateral and selling the collateral to a third party.<sup>283</sup> A creditor's right for enforcement of obligations commences when the debtor either defaults on the primary obligation, violates provisions of the mortgage agreement, or when the debtor holds himself insolvent.<sup>284</sup>

One way of resolving the issue of mortgagor's default is to file a complaint in court. The parties cannot usually predict the outcome of such cases or how the judgment will be enforced because the law on the subject is incomplete and the courts lack experience in adjudicating such claims. A court order and a notarial writ of execution usually result in an auction sale of the mortgaged property.<sup>285</sup>

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280. Oleksij Feliv, *Zvernennya Styagnennya na Predmet Ipoteki za Pravom Ukraini ta Federativnoi Respubliki Nimechchini*, 12 JUSTINIAN (2007), available at <http://www.justinian.com.ua/article.php?id=2836>.

281. See GREENWALD & ASIMOW, *supra* note 260, § 6:512.

282. Zakon Ukraini Pro Ipoteku [On Mortgage], Vidomosti Verxovnoyi Radi [BBP] 2003, No. 38, p.313, art. 1 (2003), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=898-15&p=1198099302619378> (includes changes and additions until 2006).

283. *Id.* art. 33.

284. *Id.*

285. See Volodimir Marchenko, *Priminenie Ipoteki na Practike*, 14 URIDICHESKAYA PRAKTIKA 328, Apr. 6, 2004, available at <http://www.yurpraktika.com/article.php?id=10003653>.



Additionally, the Law on Mortgage allows the parties to provide for the non-judicial enforcement of obligation in the agreement in case a condition of the mortgage agreement is violated.<sup>286</sup> Such provisions can be included in the mortgage agreement, or the parties can execute a separate agreement on enforcement of obligation.<sup>287</sup> The agreement on non-judicial enforcement of obligation has to be notarized and may be executed any time before the court reaches a decision.<sup>288</sup> In the agreement for enforcement of obligations, the parties may provide that in case of a default by the mortgagor, the mortgagor transfers their right of ownership to the mortgagee, who then has the right to dispose of the property.<sup>289</sup> Thus, unlike the American system where non-judicial foreclosure is provided by law, in Ukraine non-judicial enforcement of obligations can be carried out only if agreed to by the parties.

To sum up, the Law on Mortgage was the first and very important step in the development of mortgage relations in Ukraine which contributed significantly to the field of secured transactions. The Law on Mortgage along with other legislative materials provides a legal framework for real estate financing. At the same time, there are still many deficiencies, uncertainties and inconsistencies in this field of law. It does not create a clear and transparent legal mechanism for development of mortgage transactions. Many of the norms in the law contradict with other laws or contain references to laws that have yet to be adopted.

### C. Realities of Ukrainian Housing Financing

Even though the legal framework for housing financing has been established, the Ukrainian mortgage market is far from achieving the standards that exist in developed countries.<sup>290</sup> Only ten percent of Ukrainian citizens desiring to finance their housing receive such financing.<sup>291</sup> The problem lies in the fact that lenders are not sufficiently protected by laws and are concerned with the satisfaction of obligations in the cases of mortgagors' defaults. Creditors have to undertake too many risks in order

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286. On Mortgage art. 36.

287. *Id.*

288. See Marchenko, *supra* note 285.

289. On Mortgage art. 36.

290. Alexander Bondarenko, *Sudba Ukrainskoy Ipoteki Zavisit ot Politiki*, 6 FINANSOVIE USLUGI, available at <http://www.ruipoteka.ru/article/pub144.html>.

291. Maria Grimalyuk, *Ukrainskaya Ipoteka s Innostrannim Akzentom* (2005), <http://agent.ua/review/print/1467>.

to provide long-term financing. In order for the system to work, financial instruments beyond mortgages (e.g., credit cards, credit history reports) have to develop. Since banks undertake many risks, they make it very hard for an ordinary citizen to obtain a mortgage. Banks add many additional requirements to mortgage agreements, some of which rise to absurd and outrageous levels.<sup>292</sup>

Some problems in mortgaging are resolved through mandatory insurance policies. The laws provide for a mandatory insurance of the mortgaged property against accidental destruction, accidental damage, spoilage and other risks.<sup>293</sup> The insurance policy has to be taken in the name and for the benefit of the mortgagee.<sup>294</sup> In addition to mandatory requirements, banks add requirements of their own. Banks require that any applicant for a mortgage be relatively young and own a life insurance policy.<sup>295</sup> This additional requirement makes an already expensive application procedure even more expensive.

Since there is no credit history report to refer to, banks thoroughly verify the applicant's ability to pay. In order to apply for credit, monthly income of each family member has to be not less than three to five hundred dollars, which is more than the average compensation for a Ukrainian citizen.<sup>296</sup> The biggest problem with verifying the applicant's income is that many Ukrainian citizens, for understandable tax reasons, receive most of their compensation "under the table," or unofficially.<sup>297</sup> Thus, to verify the applicant's actual income, banks additionally consider what kind of car the person has (if there is one), in which area of the city he or she lives, as well as their place of work and position.<sup>298</sup> But the income situation of an applicant, is not all that banks want to know. Now banks require that each applicant provide them with the financial information of the applicant's relatives: spouse, children, and even grandparents.<sup>299</sup> Some banks demand that mortgagors provide them with yearly statements of their income.

In granting mortgages, Ukrainian banks demand strict adherence to the loan objective from the borrower and verify that the funds are used for the specified purpose, that is, to purchase a dwelling.<sup>300</sup> Banks also

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292. Konstantin Golubev, *Podvohi Creditnix Dogovorov* (2007), <http://www.ipoteka.net.ua/2007/05/26/podvohi-kreditnyih-dogovorov/>.

293. On Mortgage art. 8.

294. *Id.*

295. Liza Tatarinova, *Eto Sladkoe Slovo Ipoteka*, 5 STOLICHNAYA NEDVIZHIMOST, available at <http://100realty.com.ua/articles/303.html>.

296. *Id.*

297. *Id.*

298. *See id.*

299. *See Golubev, supra* note 292.

300. *See id.*

attempt to exercise control over the property secured by the mortgage by conducting random checks on the dwelling.<sup>301</sup> Thus many mortgage agreements include the mortgagee's right to verify the condition of their security: a credit inspector may unexpectedly come to the premises to verify that the financed property is not damaged.<sup>302</sup> Another limitation on the use of premises is that some mortgage agreements forbid mortgagors to lease or rent the financed premises.<sup>303</sup>

Furthermore, financial institutions have a right to change the annual percentage rate or demand the full payment on mortgage for many different reasons. For example, a bank may demand payment in full if a debtor loses his or her job, or is under criminal investigation.<sup>304</sup> A debtor also may have to pay the full amount of the obligation or pay a fine of five percent of the full amount of the loan if a creditor finds out that the debtor is not using the money received from the bank according to its specified purpose.<sup>305</sup> If a mortgagor fails to notify the bank within fourteen days of a change of address or employment information, the lender may fine such a forgetful mortgagor in the amount of one percent from the loan amount.<sup>306</sup>

Another huge problem with obtaining financing for housing involves the laws that protect children. According to the Ukrainian laws, a child cannot be evicted from the living quarters without permission from the child protection services.<sup>307</sup> Thus, in case of a mortgagor's default, the bank would have difficulties evicting a family with children. This gives a bank the right to refuse financing a property where one of the owners or residents is a child.<sup>308</sup> Additionally, after financing the property, banks require the mortgagor to obtain permission from the lender if the mortgagor wants to register an underage resident on secured property.<sup>309</sup> Therefore, ironically, families with children that are usually in most need of financing cannot obtain it.

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301. *See id.*

302. *See id.*

303. *See id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Aleksandr Bondarenko, *Sudba Ukrainskoy Ipoteki Zavisit ot Politiki*, 6 FINANSOVIE USLUGI (2006), <http://www.ruipoteka.ru/article/pub144.htm>.

308. *Id.*

309. *Id.*

To sum up, the Ukrainian legal system of today is immature and incomplete in the sphere of the satisfaction of an obligation. Even though it provides a basic framework, Ukraine's laws do not protect all of the subjects of such relations. These imperfections lead to the fact that lenders are trying to protect themselves by including additional limitations in mortgage agreements which hinder a further development of mortgage relations.

#### IV. CONCLUSION

Since achieving its independence in 1991, Ukraine underwent a considerable transformation both politically and culturally, as well as legally. Ukraine is slowly evolving from a Soviet centrally-planned economy to a market economy. After the independence, Ukraine inherited the Soviet legal system known for its disparity of law in practice and law on the books.<sup>310</sup> Such disparity continues to exist in modern day Ukraine, but there is hope that it will change over time. After the dissolution of the Soviet Union, Ukraine needed to change not only its legal system, but also the legal thinking. Legal decisions needed to be adapted to the requirements of a new market economy.

Implementation of a new system which would effectively regulate secured transactions is a long and hard process. Although the necessary initial conditions for the development of mortgage market in Ukraine have been established, it is too early to say that the system is fully functional. To create an infrastructure for a mortgage market, additional financial mechanisms have to be implemented, including title insurance companies, escrow companies, issuance of credit cards, development of credit history and, most importantly, the passage of laws which would provide for a clear, integrated system for registration of property rights. In addition, existing financial structures and mechanisms, such as banking, bankruptcy and land privatization, need to be improved and stabilized.

The laws regulating mortgage also have a lot of room for improvement. The implementation of a new financial legal system must be done with care and consideration for Ukraine's existing economic and social conditions. Lawmakers should use the experience of other countries where the mortgage system has been developing for hundreds of years. At the same time, such experience should not be blindly implemented in

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310. Professor Schwarzschild provides an in-depth discussion on how Soviet laws on paper differed from the law in practice and how communist propaganda and control of publications and media covered it. See Maimon Schwarzschild, *Variations on an Enigma: Law in Practice and Law on the Books in the USSR*, 99 HARV. L. REV. 685 (1986) (book review).

Ukrainian laws, but rather should be tailored to reflect particular national specificity. The multiplicity and inconsistency of different laws and norms should be reduced. In order to create a clear and transparent legal system, Ukraine needs to emphasize legal education and public access to the laws and legal regulations.

